Thomas M. Monson, SBN 071993
Susan L. Horner, SBN 144806
MILLER, MONSON, PESHEL, POLACEK & HOSHAW
A Partnership of Professional Law Corporations
501 West Broadway, Suite 700
San Diego, CA 92101
(619)239-7777
FAX: (619) 238-8808
e-mail: tommonson@erisa-law.com

Attorneys for Plaintiff

FILED
2008 MAY 20 PM 3:05
CLERK US DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA
BY KWH DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TODD NASH an individual, Plaintiff, v. **LIFE INSURANCE COMPANY OF NORTH AMERICA,** an Illinois corporation, **GROUP LONG TERM DISABILITY INSURANCE PLAN FOR ADMINISTAFF OF TEXAS INC. AND PARTICIPATING COMPANIES,** a group welfare benefits plan under ERISA Defendants.	CASE NO.: '08 CV 0893 WQH RBB COMPLAINT TO DETERMINE AND ENFORCE RIGHTS TO LONG TERM DISABILITY BENEFITS UNDER THE LTD PLAN, CLARIFY FUTURE RIGHTS TO LTD BENEFITS UNDER THE TERMS OF THE PLAN, AND FOR OTHER APPROPRIATE EQUITABLE RELIEF 29 U.S.C. § 1132(a)(1)(B) and (a)(3) ERISA § 502 (a)(1)(B) and (a)(3)

Plaintiff **TODD NASH** ("Plaintiff") complains and alleges as follows:

JURISDICTION AND VENUE

1. This Court's jurisdiction is invoked under the federal question jurisdiction of 28 U.S.C. §§ 1331 and 1337, and the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1101, *et seq.* ("**ERISA**"), 29 U.S.C.§ 1132(a), (e), (f) and (g), as it involves a claim by Plaintiff for Long Term Disability ("LTD") benefits under an employee group welfare benefit plan governed by ERISA.

///

2. Venue is proper within the Southern District of California pursuant to 29 U.S.C. § 1132(e)(2), ERISA § 502(e)(2): this is the District where the ERISA Plan is established, maintained and administered, Defendants conduct business and may be found in this District and the ends of justice so require.

3. The ERISA statute and the Secretary's Regulations provide, at 29 U.S.C. §1133, 29 C.F.R, § 2560.503-1(h)-(j) procedures for internal appeal and review of benefit denials. Those avenues have been exhausted.

NATURE OF ACTION

4. This action seeks disability benefits under ERISA, clarification of the terms of the LTD Plan and the long term disability insurance policy that insures the LTD Plan during the time period that is the subject of this action, and to future rights to benefits under said group policy, and seeks to enjoin the insurance company claims handler from adding new procedures to its insurance policy claims procedures or to the LTD Plan, and for other equitable relief as the court determines is appropriate.

5. Plaintiff is informed and believes and based thereon alleges that Defendant's acts in improperly administering and denying Plaintiff's valid disability claim violates 29 U.S.C. § 1104, ERISA § 404, 29 U.S.C. § 1133, ERISA § 503, and its related regulations of the Secretary of Labor at 29 C.F.R. 2560.503-1 (a) through (m), which is the federal law that regulates that aspect of the employment relationship pertaining to employee benefits, and is an act of unlawful discrimination against Plaintiff under IRC § 62(e). ERISA § 502 is the enforcement provision of the statute under which Plaintiff has brought this action.

PARTIES

6. Plaintiff **TODD NASH** ("Plaintiff") is and at all times relevant herein has been a resident and citizen of the County of San Diego, State of California.

7. The Defendant Group Long Term Disability Insurance Plan for Administaff of Texas Inc. ("LTD Plan") is an employee welfare benefit plan established and maintained by Administaff of Texas ("Administaff") for the benefit of employees of Administaff and participating companies including Plaintiff's employer, Morpho Technologies of Irvine, CA.

8. Plaintiff is informed and believes and based thereon alleges that Administaff, Inc. www.administaff.com, whose corporate headquarters are located in Houston, Texas, has 49 offices in 24 markets including San Diego and Los Angeles.

9. Plaintiff is informed and believes and based thereon alleges that, Life Insurance Company of North America (**LINA**) is a corporation, duly licensed, organized and existing under the laws of the state of Pennsylvania with its principal home office located in the City of Philadelphia, State of Pennsylvania, and is and at all times relevant herein, has been licensed to do business as a foreign corporation in the State of California and is doing business within this District.

10. Upon information and belief, LINA is a CIGNA Company and sometimes operates under the name of "CIGNA Group Insurance."

GENERAL ALLEGATIONS

Insurance Coverage:

11. Upon information and belief, LINA issued a group insurance contract, Group Policy SLK-030024 ("Group Policy"), to Administaff effective January 1, 2000, to provide both short term and long term disability coverage (STD and LTD) to all full time active employees, including Class I employees, who participated in the LTD Plan, subject to a 90 day Eligibility Waiting Period.

12. Plaintiff is a "Class I" insured under the LTD Plan and Group Policy.

13. The Group Policy contains two disability definition tiers, the first applicable to the first 30 months (2.5 years) comprising the STD and the "regular-occupation" disability period, and the second applicable to disabilities that continue beyond 30 months.

14. An employee is considered disabled for the first 2.5 years — during the STD and LTD regular occupation periods — if, "solely because of Injury or Sickness, he or she is either:

> 1. Unable to perform all the material duties of his or her *Regular Occupation* or a *Qualified Alternative*; **or**
>
> 2. Unable to earn 80% or more of his or her Indexed Covered Earnings.

15. The Group Policy defines "*Regular Occupation*" as "[t]he occupation the Employee routinely performs at the time the Disability begins," stating that "in evaluating the Disability,

the Insurance Company will consider the duties of the occupation as it is normally performed in the general labor market in the national economy."

16. The Group Policy defines a "*Qualified Alternative*" as

"an occupation that meets all of the following conditions:

1. the material duties of the occupation can be performed by the Employee based on his or her training, experience or education;

2. it is within the same geographic area as the Regular Occupation the Employee holds with the Employer on the date the Employee's Disability begins;

3. a job in that occupation is offered to the Employee by the Employer; and

4. the wages for that occupation, including commissions and bonus, are 80% or more of the Employee's Indexed Covered Earnings.

17. Payment of STD benefits begin after a 14 day "elimination period" following the start of disability and continue for up to six months of continued disability at a rate of "the lesser of 60% of your weekly Covered Earnings rounded to the nearest dollar or the Maximum Disability Benefit" which is "$2,308 per week" or approximately $9,232 per month. After six months of STD, the Group Policy provides for payment of monthly LTD benefits for continuing disability at the rate of "the lesser of 60% of your monthly Covered Earnings rounded to the nearest dollar or the Maximum Monthly Benefit" of "$10,000 per month."

18. After disability has lasted 30 months, an employee will still be considered "disabled":

"if, solely due to Injury or Sickness, you are either:

1. unable to perform all the material duties of any occupation for which you are, or may reasonably become, qualified based on education, training or experience; **or**

2. unable to earn 80% or more of your Indexed Covered Earnings."

19. Monthly LTD benefits will continue subject to "continued proof of your Disability" but end the earlier of, the date

(1) you earn 80% or more of your Indexed Covered Earnings;
(2) we determine you are not Disabled;
(3) of the Maximum Benefit Period [age 65];

(4) you die;

(5) you refuse, without Good Cause, to fully cooperate in all required phases of the Rehabilitation Plan;

(6) you refuse, without Good Cause, to fully cooperate in a Transitional Work Arrangement;

(7) you are no longer receiving Appropriate Care;

(8) you fail to cooperate with us in the administration of the claim. Such cooperation includes, but is not limited to, providing any information or documents needed to determine whether benefits are payable or the actual benefit amount due. Benefits may be resumed if you begin to cooperate.

20. LINA is the entity which pays the claim from its assets, the entity which is responsible for investigating the claim and performing the claims handling and decision making under the Secretary's claim regulations at 29 C.F.R. 2560.503-1, and then decides whether it will pay the claim.

Occupation

21. Plaintiff was "Vice President of Business Development" of Morpho Technologies in Irvine CA (hereinafter "Morpho") at the time he became disabled in September 2003, earning $13,046.18 per month.

22. Plaintiff's personal presence was required in the offices of Morpho at all times, working primarily at his desk, except when periodically required to travel to potential customers, domestically and internationally.

23. The "Vice President of Business Development" is a "key employee" position at Morpho.

24. The occupation of Vice President of Business Development is an occupation in the field of sales and marketing, requiring the employee to primarily sit upright at one's desk all day with limited periods of daily walking. It also involved job-related domestic and international travel, which similarly required substantial periods of sitting for hours in cramped aircraft seating during the travel, additional continuous sitting during long meetings with prospective clients, plus walking to and from the meetings and at the airport rolling a suitcase with some limited carrying of light items.

25. Plaintiff's occupation of Vice President of Business Development included all sales and marketing tasks of Morpho, both foreign and domestic, in addition to corporate management activities. Plaintiff was often the sole representative from Morophо at executive meetings with companies including

Motorola, Samsung, Nokia, Qualcomm, Hyundai, Sony, Panasonic, Ericsson, Texas Instruments, General Electric, etc. [TN_2APP0376 ,0413]

26. Plaintiff's regular occupation is a sedentary occupation.

27. Plaintiff's regular occupation also requires sustained high-level mentation and cognitive analytical functions throughout his 50 hour work week (10-hour work days). [O*NET @ TN_2APP0378-379, 0381-384, 0386-388].

28. The first two of five categories of "physical strength" used by the United States Department of Labor ("DOL") are (1) "*Sedentary*"— which requires "exerting 10 pounds of force *occasionally* and/or a negligible amount of force *frequently* to lift, carry, push, pull, or otherwise move objects, including the human body"; and (2) *Light*— "exerting up to 20 pounds of force *occasionally,* and/or up to 10 pounds of force *frequently,* and/or a negligible amount of force constantly to move objects."

29. In terms of a work day, the DOL defines "*occasional*" as performing a particular activity or function up to 2-3 hours over the course of one 8-hour work day, which is one-quarter to one-third of each work day. A "sedentary occupation" requires, among other bending, stooping, reaching, handling etc., requirements, positional and strength requirements of *at least* five and one-half (5.5) hours of prolonged continuous daily sitting each 8-hour day, and up to two and one-half (2.5) hours of standing and walking during an 8-hour day, and the "occasional" lifting of up to 10 pounds — for up to one-third (1/3) of a day, usually performed while seated.

30. **A Sedentary** occupation is one which requires:

> "Exerting up to 10 pounds of force *occasionally* or a negligible amount of force *frequently* to lift, carry, push, pull, or otherwise move objects, including the human body.
>
> Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time.
>
> Jobs are Sedentary if walking and standing are required only occasionally and all other Sedentary criteria are met."

31. The DOL's former Dictionary of Occupational Titles, last updated in 1991 and used in conjunction with the "Occupational Outlook Handbook (http://www.bls.gov/oco/) [TN_2APP0397], was replaced in or about 2002 by the "Occupational Information Network" —O*NET.

http://online.onetcenter.org).

32. O*NET has been endorsed by, among other, the American Insurance Association (AIA), the Insurance Information Institute , the National Associations of Independent Insurers (NAII) and of Group Underwriters Association of America. [TN_2APP1359-1360].

Medical history to September 2003 disability:

33. Plaintiff has post-traumatic severe osteoarthritis disease of the left hip.

34. In early 1998, Plaintiff began experiencing increasing discomfort in his left hip due to progressive deterioration of the hip and development of osteoarthritis since a left hip fracture in a motor vehicle accident many years earlier.

35. Plaintiff's hip degeneration and related discomfort increased between 1998 and 2003.

36. By mid 2003, the condition of Plaintiff's left hip had progressed to "*severe post-traumatic degenerative arthritis of the left hip with congruent loss of the articular space and bone-on-bone contact*," confirmed by July 2003 radiographic testing and August 8, 2003 standing AP of the Hips.

37. Plaintiff's left femoral neck was deformed and remodeled, and the hip demonstrated *severe degenerative osteoarthritis, osteophytes (bone spurs)/osteophytosis, acetabular damage, and the cartilage and articular joint space was nearly obliterated producing "bone-on-bone" contact and pressure or grinding of the femur against and within the hip socket as well as some lateral subluxation (dislocation) of the hip bilaterally.* [TN_2APP0077, 79-80, 118-119]

38. Plaintiff's abnormal left hip anatomy produced severe deep aching joint pain, primarily 1) when attempting to maintain hip range of motion at or around, or past, its significantly-reduced maximum degree of motion, and/or with sustained bone-on-bone pressure of the femoral head against the pelvis at the acetabulum (the hip socket), which occurs during prolonged sitting and standing.

39. Plaintiff's increasing severe discomfort with prolonged day-long sitting postures required by his occupation became intolerable irrespective of how he tried to move around and alternate positions and pressures and remove his hip from a position that was at or close to the maximum ROM to try to relieve it. The intolerable levels of pain occurred after trying to maintain the flexed angle of the hip so as to work at his desk for periods of between 10 and 90 minutes, requiring that he either take frequent

and increasingly prolonged rest periods equal to or greater than the period of the sustained posture, having to recline so as to decrease the angle at which the hip was bent and relieve the pain-producing pressure, and/or take heavy narcotic pain medications which caused sedation, adversely affecting focus, concentration, attention and/or any analytical activities.

40. Plaintiff is allergic to and cannot take over-the-counter NSAIDs (NonSteroidal Anti-Inflammatory Drugs) and anti-inflammatory drugs including Aspirin, Ibuprofen, Naproxen, etc., commonly prescribed for the inflammation of arthritis.

41. Plaintiff's left hip pain was and is nonresponsive to acetaminophen (analgesics), such as Tylenol, Excedrin.

42. Treatments by intra-articular injection of Xylocaine and Depo-Medrol were short-lived and ineffective.

43. Narcotic pain medications, such as Vicodin (Hydrocodone), causes Plaintiff lightheadedness, drowsiness, impaired attention, concentration, motor function and reaction time and preclude driving, air travel and any advanced analytical or complex mentation which his occupation requires.

44. Narcotic pain medications including Vicodin are well-known to produce adverse cognitive effects and a high risk of narcotic dependency.

45. To prevent drug dependence and/or narcotic addiction, Plaintiff necessarily has to reserve the taking of his narcotic pain medication for the most severe of his pain or for those days necessitating greater activity and resulting significant pain.

46. Plaintiff's inability to tolerate the extent of pain renders him unable to remain functional in performing his required daily work duties.

47. Plaintiff was thus left to manage his symptoms through avoidance of the pain-producing nonexertional postures, positions and certain exertional activities that required bending past the range of motion restrictions of his diseased hip, or prolonged standing or walking.

48. Plaintiff's severe left hip disease causes marked limitations in the Range of Motion (ROM) of the left hip. Plaintiff's ROM limitations create great difficulty in sitting and in forward bending to any significant degree, rendering Plaintiff unable to put on his socks, tie his shoes, or walk up and down more

than a few stairs or sit upright at all, without experiencing significant pain or the need to cease the attempted activity. The limited hip ROM makes it further unbearable to *sit even leaning back* at a desk for any prolonged period.

49. Plaintiff's pain and/or medications seriously impacted cognition required of highly technical products and services relating to digital signal processors and their use in electronic devices.

50. Plaintiff also suffers bilateral knee instability as a result of prior reconstruction of the "ACL" (Anterior Cruciate Ligament of the knee) with graft on the right knee 15 to 20 years ago.

Disability, September 2003 forward:

51. Plaintiff's treating orthopedist, Dr. Tohidi, explained on **September 5, 2003** that Plaintiff's only two options were to significantly modify and limit postures and activity and eliminate the painful prolonged sitting or standing, which precludes his occupational or other employment with similar attributes or, at such time as significant activity and postural/positional modification could no longer provide sufficient pain control, to proceed with a "total hip" replacement.

52. Dr. Tohidi did not recommend performing a "total hip" until some time in the future because of the Plaintiff's young age of 40 at the time and the limited life span of a hip prosthesis and the expectation of the need for repeat hip surgery. [TN_2APP0290].

53. Because Plaintiff was a Morpho "key employee" and because of the nature of his work, Plaintiff could not accommodate his disabling condition sufficiently to perform his occupation part-time, intermittently or sporadically, and he was unable to perform the essential and material duties of his occupation since he could not sit upright at all and could not consistently sit even in a modified position to do work at his desk on a day-to-day basis more than about 2.5 hours each day, spread out in interrupted periods interspersed with rest, over his 10-hour work days.

54. In **September 2003**, after all of his adjusted positions and postures could no longer accommodate his severe hip disease, and after failed pain management attempts and the failure of the limitations and medical restrictions to sufficiently control pain while attempting to perform his occupational duties, Plaintiff was finally forced to cease forcing his hip into the postures required at work to perform his occupation due to the severe pain they produced.

55. Plaintiff was confirmed disabled on and after **September 26, 2003**.

56. Plaintiff's earnings at the time he became disabled were $151,424 per year, $12,618.66 per month.

57. Eighty percent (80%) of Plaintiff's monthly predisability earnings to be applied to above-alleged paragraphs 14 through 17 disability definition or *qualified alternative* was $10,095.00.

58. Monthly benefits payable under the Group Policy are **60%** of the $12,618.66 monthly predisability earnings, or **$7,571.19,** less applicable offsets.

59. LINA makes its payment of a claimant's disability benefits check at the end of each month the claimant is disabled.

60. Despite attempted pain management by activity and positional restrictions, Plaintiff still required a prescription refill of Vicodin which he filled in November 2003.

61. On **October 9, 2003**, Morpho's General Counsel and Vice President Human Resources, Mary Beth Carney, provided Administaff's Human Resources specialist Vandalay Crayton, with a description of Plaintiff's occupational duties, which Administaff forwarded to LINA.

62. On **October 14, 2003**, LINA concurred Plaintiff was totally disabled from his occupation according to the definition alleged at Paragraphs 14 - 16 above and began paying monthly STD benefits.

63. Plaintiff's physical limitations and disability ultimately resulted in his termination from his position at Morpho.

64. Plaintiff refilled a 40-tablet Vicodin prescription January 2004, at which time his treating orthopedic specialist, Dr. Tohidi, advised LINA that:

> ① Plaintiff was "not [to] perform activities that may become hazardous while taking narcotics,"
>
> ② Plaintiff's limited ROM motion precludes the ability to perform job functions without significant pain;
>
> ③ "throughout an 8-hour workday, can tolerate, with positional changes and meal breaks, the following activities for the specified duration:
> - less than 2.5 hours sitting [never upright], standing, walking, reaching at overhead or desk level (but not below waist),
> - "occasional" 10 pound maximum lifting or carrying, pushing or pulling, but restricts such activities over 11 lbs.

④ Plaintiff is restricted from: climbing ladders, balancing, stooping or crouching, kneeling, crawling or working extended shifts.

65. On **January 14, 2004** [TN_2APP0285], Dr. Tohidi reported that

① Plaintiff's (progressive) condition was unchanged;

② Plaintiff "has pain all day, which is aggravated with the various levels of activity";

③ "sitting is quite painful for him and after about 30 minutes the pain becomes intolerable, forcing him to move around";

④ "no further change at this time could be implemented in his activity status or his job...";

⑤ "in my opinion the restrictions that he has are limitations of sitting and his tolerance on a subjective and objective basis, is about 30 minutes, following which he needs to move around to relieve the intensity of the pain. He also has limitation in mobility, such as prolonged standing or walking";

⑥ as for "objective aspects of his hip condition. . ., he has significant limitation of range of motion to the hip with stiffness and an antalgic gait with radiographic and clinical evidence of end-stage hip osteoarthritis";

⑦ "He is limited as far as cognitive functions are concerned in regard to the effect of narcotic analgesics." [TN_2APP0287-88].

66. Among other, Dr. Tohidi advised LINA on **January 14, 2004** that it is the severity of Plaintiff's hip pathology that causes Plaintiff such pain after sitting for 15 minutes, but that Plaintiff could sometimes tolerate 1.5 hours sitting at home where he could lean back in a slouch where he could move his hip from a position well away from his maximum ROM and the ROM-related pain-producing pressure in the hip joint, and/or lay down for periods for the same reason; that Plaintiff must be able to constantly change what he does, walking, laying, sitting, to help manage the pain; and that testing reveals significantly decreased range of motion (ROM) of the left hip.

67. On **January 29, 2004**, CIGNA's vocational rehabilitation counselor wrote to Morpho's Human Resources Manager Mr. Rakhshan, about Plaintiff's physical restrictions, "hoping" he could consider accommodations or job modifications [TN_2APP0406-408, 410].

///

68. However, Morpho could make no further accommodations or job modifications that would permit Plaintiff to sufficiently continue performance of his occupation or other occupation at Morpho.

69. LINA paid Plaintiff the full six months of occupational STD benefits for his left hip disability under the definition.

Long Term Disability:

70. On or about **March 16, 2004,** LINA determined Plaintiff continued to be disabled from his left hip condition under the definition at Paragraphs 14-16 above, and began payment of LTD benefits effective 3/28/2004.

71. LINA explained that LTD benefits are payable while Plaintiff is under the care of a licensed physician, that LINA would request periodic updates on the status of his disability, and reserved the right to have Plaintiff examined by a physician of its choice.

72. Plaintiff refilled a 50-tablet Vicodin prescription in May 2004.

73. At LINA's urging, Plaintiff submitted a Social Security Disability Income benefits application to the Social Security Administration (SSA).

74. The SSA definition of disability is the "inability to engage in any substantial gainful activity by reason of any . . . physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." Upon information and belief, the SSA provides at 20 C.F.R. § 404.1505(a) that "to meet this definition, you must have a severe impairment(s) that makes you unable to do your past relevant work or any other substantial gainful work that exists in the national economy."

75. On or about **6/5/2004**, the SSA found Plaintiff was disabled under its definition, 42 U.S.C. § 423(d)(1)(A), and entitled to monthly disability benefits beginning March 2004 —the first month after five full calendar months' of disability. [TN_2APP0351-0352].

76. If LINA did not believe Plaintiff was disabled under the SSA definition (which is far more stringent to meet than the subject policy definition), LINA would not have urged Plaintiff to file for Social Security Disability Benefits as it would have been urging acts to defraud the Federal Government.

///

77. LINA embraced the SSA's determination of Plaintiff's disability for its own benefit by offsetting the full $2,980 monthly amount of Primary and Dependent Social Security Disability Income (SSDI) from the $7571.20 Gross Benefits amount of LTD benefits it had to pay under LINA's policy, i.e., paying Plaintiff a monthly Net Benefit Amount of $4,591.00.

78. SSA continues to determine Plaintiff remains disabled.

79. At his examination with Dr. Tohidi on **January 4, 2005**, Dr. Tohidi noted that Plaintiff's level of left hip deterioration had advanced, found increased restrictions in ROM, increased hip stiffness, and confirmed that Plaintiff's positional limitations and disability remained unchanged.

80. Dr. Tohidi also reported to LINA that it was the high level of advanced hip pathology that precluded Plaintiff from being a candidate for rehabilitation services, and thus Dr. Tohidi did not recommend "vocational counseling and/or retraining."

81. Dr. Tohidi advised LINA that there was no job modification that would accommodate Plaintiff's impairments.

82. Plaintiff refilled a 60-table Vicodin prescription in January 2005.

83. In **August 2005**, six months prior to the beginning of the "any occupation" coverage period as defined under the policy, Steven Eccles was the claim representative for LINA who was investigating whether Plaintiff met the "any occupation" disability definition alleged at paragraph 18 hereinabove. That disability definition was to start March 29, 2006.

84. Because of Plaintiff's positional and activity limitations and restrictions, Plaintiff remained both unable to perform all the material duties of any occupation for which he was qualified based on his education, training or experience; **AND** was "unable to earn 80% or more of [his] *Indexed Covered Earnings*".

85. "*Indexing*" of the predisability monthly earnings amount — $12,618.66 — is performed "after 12 Monthly Benefits are payable":

> "...*Indexed Covered Earnings* are your Covered Earnings **plus an increase applied on each anniversary of the date Monthly Benefits became payable**. The amount of each increase will be the lesser of:
>
> 1. 10% of your Indexed Covered Earnings ["ICE"] during your preceding year of Disability; **or**

2. the rate of increase in the Consumer Price Index (CPI-W) during the preceding calendar year.

86. On March 28 of each year beginning the first anniversary of benefits payments — 3/28/2005 — Nash's predisability "Covered Monthly Earnings" upwardly adjusts by the rate of increase of the CPI-W, and adjusts again each successive anniversary thereafter by the next year's CPI-W.

86-a. Upon information and belief, Plaintiff's 2005 to 2008 "Indexed Covered Earnings" ("**I.C.E.**") and the 80 % earnings level needed to defeat disability [TN_2APP0133-34] are:

			CPI-W	I.C.E.	80% of ICE
3/28/2004: predisability monthly earnings: 12,618.66					
3/28/2005:	12,619	x	2.61%	12,948	10,358
3/28/2006:	12,948	x	3.52%	13,404	10,723
3/28/2007:	13,404	x	3.23%	13,837	11,070
3/28/2008:	13,837	x	2.85%	14,231	11,385

87. At end-**September 2005**, Plaintiff advised Eccles that his (Plaintiff's) treating orthopedist Dr. Tohidi was moving to Georgia and he, Plaintiff, would have to be referred by his 'HMO' to get a new orthopedic specialist, and that that process takes time. [TN_2APP0499-400]. Eccles asked Plaintiff to get a copy of his medical chart and to ask Dr. Tohidi to complete LINA's "*Physical Ability Assessment*" (PAA) form.

88. Eccles did not advise Plaintiff that LINA needed him to undergo an updated physical examination before his next annual examination time in January 2006. [TN_2APP 0180-0181].

89. Upon information and belief, LINA's nurse requested specific medical information from the claims manager, but the claims manager never requested that information from Plaintiff.

90. After learning Dr. Tohidi was moving to Georgia, Eccles submitted Plaintiff's file (or some portion of it) to LINA's Special Investigations Unit in **September 2005** to schedule surveillance on Plaintiff.

91. Eccles forwarded a form to Dr. Tohidi to complete, asking for Dr. Tohidi's updated medical opinions.

///

///

92. In **October 2005**, Dr. Tohidi completed (and *twice-faxed to LINA,* on 10/10/05 and 10/18/05) the "*Physical Ability Assessment*" ("PAA") form, repeating what he since September 2003 had advised LINA about his patient's severe degenerative condition:

> "Mr. Nash has severe L hip pain when sitting in a confined area as a chair or airplane seat, walking over 1/4 mile, standing and climbing stairs, L hip limited motion precludes crouching. Hip pain occurs in 10 - 90 minutes with the above activities. Anti-inflammatory meds and ASA have not been remedial. Narcotics preclude cognitive function.

93. The PAA form does not request any ROM measurements nor request other medical tests.

94. Other than the PAA form, LINA did not ask Dr. Tohidi for any other specific records or indicate any need for any other updated information, examination, testing, or explanations.

95. On **October 25-29, 2005**, an employee of Photofax, Inc., a surveillance company LINA uses, surveilled Plaintiff over the period of five (5) full days, October 25-29, 2005.

96. The only video footage provided to LINA by Photofax Inc. totaled 4 non-continuous hours (240 minutes), related to the 5 days of surveillance.

97. After receiving the video report and footage by PhotoFax letter to CIGNA dated November 7, 2005 [TN_2APP0538-555].

97-a. LINA sought no input, additional information, or explanation from Plaintiff regarding anything on the video footage or described in the report;

97-b. LINA did not ask Plaintiff about the time, day or number of pain medications taken by Plaintiff on the surveillance days;

97-c. LINA did not request Dr. Tohidi, who had examined and followed Plaintiff's progressive hip disease since mid-2003, to view the surveillance footage and provide his assessment and comments about the positions, gait and 'activities' on it from an orthopedic medical standpoint in comparison to the requisite positional and physical requirements of Plaintiffs own sedentary occupation or any other sedentary occupation or light occupation;

///

97-d. LINA made no comparison of the activities or positions on the video footage to each of the material duties of Plaintiff's occupation of Vice President, Business Development or any Qualified Alternative, on a full time basis, 5 days per week, or any other identifiable occupation and each of its material duties, to determine whether the surveilled alleged activities fairly represented said duties throughout a work day, consecutively day after day, and whether and how they proved that Plaintiff could perform each of the material duties of his own occupation or another occupation for which he was educated, trained or experienced and could earn at least 80% of his indexed covered earnings in the coming 3 months.

97-e. LINA did not request or schedule in independent medical examination to clarify any information or evidence it later claimed to lack.

98. Plaintiff's "activities" on the late-October 2005 surveillance days were not representative of the positional occupational requirements of "of his ... *Regular Occupation* or of a *Qualified Alternative*" and did not reveal him performing any prolonged sitting, including day-long sitting at a desk.

99. Plaintiff's "activities" on the late-October 2005 surveillance days were not representative of the positional requirements of his own or any other occupation for which he had education training or experience and could earn 80% of his predisability covered monthly earnings

100. On December 6, 2005, LINA's nurse called Plaintiff and "encourage[d]" him to obtain a new orthopedic surgeon, and was again told Dr. Tohidi had moved to Georgia and that Plaintiff had not been referred to a new orthopedic surgeon yet. LINA did not advise Plaintiff that it needed a new X-ray, new ROM measurements to check for further deterioration in motion, or any specific information.

101. On December 13, 2005, Plaintiff refilled his prescription for Vicodin, 50 additional tablets.

102. Plaintiff received a benefits check for each month at the end of the month, including June 30, 2005, July 31, 2005, August 31, 2005, September 30, 2005, October 31, 2005, November 30, 2005. Plaintiff's next monthly benefits payment of $4,591.00 was due December 30, 2005.

///

///

Claim Termination, December 13, 2005

103. By letter dated **December 13, 2005**, LINA's Stephen Eccles mailed to Plaintiff an unexpected notice to Plaintiff that LINA terminated his claim and that Plaintiff would be receiving no further disability benefits payments. [TN_2APP0524-529]. A true and correct copy of this adverse decision is attached as **Exhibit A** hereto.

104. Prior to sending the surprise December 13, 2005 letter, LINA

a. did not inform Plaintiff that he needed to undergo an updated orthopedic medical examination by Dr. Tohidi.

b. did not request updated "Range of Motion" (ROM) data, new x-rays, or any other medical or functional tests,

c. did not request an independent medical examination of Plaintiff even though the policy provided LINA with this right.

d. did not tell Plaintiff LINA was having any difficulty in contacting Dr. Tohidi, if it was, although Plaintiff had advised LINA that Dr. Tohidi had moved his practice to Georgia in September 2005 and that Plaintiff was having a difficult time obtaining a rapid referral from his HMO for a new orthopedic surgeon.

e. did not tell Plaintiff that LINA had surveillance footage and a report, nor did it ask Plaintiff or Dr. Tohidi to view and comment on the video surveillance report or footage.

f. did not have any qualified physician in the relevant field, or in any field, conduct a personal interview of Plaintiff.

g. did not obtain any internal medical paper review from any LINA physician, of Plaintiff's medical history relating to his left hip severe post-traumatic degenerative and progressive osteoarthritis, including by any physician specializing in the in the area of orthopedic surgery.

h. did not request submission of a duplicate copy of the X-ray films taken of Plaintiff's left hip.

i. did not request or obtain a Functional Capacity Examination ("FCE") of Plaintiff or a one-week work tolerance testing.

j. did not receive any notice from the SSA claiming Plaintiff was no longer disabled from any gainful occupation under the SSA definition and did not receive any notice from the SSA claiming he was no longer eligible to receive SSDI benefits.

105. Without verifying through due diligence and investigation of factual allegations asserted in the surveillance report, and without any inquiry of Plaintiff or his physician regarding the surveillance, LINA made both misleading and false allegations regarding Plaintiff's 'activities' on the surveilled days by for instance, ❶ *falsely alleging* Plaintiff was "working in another occupation at Witch Creek Winery" from 10:30 am to 2:30 pm October 27, 2005, when he was neither working in another occupation at the Winery, nor even present at the Winery for the period of time alleged [TN_2APP0168, 0454-0457, 0493-494]; ❷ *falsely alleging* that Plaintiff carried, loaded and unloaded to/from his car a "4' x 8' sheet of drywall", when he did not [TN 2APP0160; 167; 446–448; 466-471]; ❸ *falsely alleging* that Plaintiff engaged in unloading pieces of plywood from his car, when he did not [TN_2App0168]; ❹ *falsely alleging* Plaintiff was climbing "ladders", when he did not [TN_2APP0168, 450]; ❺ *falsely alleged* that Plaintiff's stepmother provided information regarding Plaintiff, when she did not; ❻ *falsely made statements* about Plaintiff's activities that were incorrect or did not happen; ❼ *falsely alleged* that Plaintiff did not walk with a limp when he did [TN_2APP0446, 448-453], ❽ *falsely alleged* Plaintiff filled a bucket with rock and hauled it in a wheelbarrow, when he did not [TN_2APP0450-451, 457-458]; ❾ *falsely alleged* that plaintiff ran up a hill while pushing a stroller when he did not; etc.

106. LINA did not correlate the nature or extent of Plaintiff's alleged activities on the 5-day surveillance to each of the material duties of Plaintiff's full time own occupation, and specifically, to the day-long required sitting working at a desk required of Plaintiff's occupation or any qualified alternative.

107. LINA did not request information from Plaintiff about what narcotic pain medications he took during the surveillance week, including the times Plaintiff could not drive [TN_2APP0458-459].

108. Plaintiff's "activity" during the 5-day surveillance totaled 4 hours (240 minutes) out of the five days, which is approximately three percent (3.33 %) of the five days [TN_2APP0157-158]. None of the surveilled 'activity' showed plaintiff sitting or sitting upright at a desk for any period, much less prolonged periods throughout the day, as required by his or any sedentary occupation.

///

109. LINA's claim termination hinged on the misrepresented and faulty surveillance about which LINA sought no comment from Plaintiff or Dr. Tohidi before terminating the claim December 13, 2005.

110. LINA sent no benefits payment on the next check due date by December 31, 2005.

111. LINA's termination letter listed the records LINA reviewed in terminating the claim, but did not include Plaintiff's Hip X-rays of July and August 2003, various Physical Activities Assessment forms, medical letters and notes of Dr. Tohidi, the Social Security Disability approval or the November 2004 annual examination by Plaintiff's other treating physician, Dr. Lin.

112. Upon information and belief, Plaintiff contends that on and after August 2005, LINA unreasonably and in its own self interest failed and refused to engage in the necessary factual inquiry, and shut its eyes to information that would have been readily available or easily obtainable had LINA only asked for it, and also failed to engage in the requisite meaningful dialogue required of claims administrators in *objectively* processing disability claims under ERISA as described by this Circuit over a decade ago. Booton v. Lockheed Medical Benefit Plan, 110 F.3d 1461, 1465 (9th Cir. 1997), and reiterated by this Circuit in Saffon v. Wells Fargo & Co. [LTD] Plan (& MetLife), ___ F.3d ___, 2008 U.S. App. LEXIS 8136 (9th Cir. Cal. 2008).

113. LINA's December 19, 2005 letter invited Plaintiff to "appeal" the termination within 180 days and submit any "*written comments*" he wished, "*any new documentation you wish us to consider*," and then included generic categories of "physician's office notes, hospital records, consultations, test result reports, therapy notes, physical and/or mental limitations, etc. . . . cover[ing] the period of January 1, 2005 through present" and "copies of any recent test results performed (in the last 6 months)."

114. LINA did not specify for Plaintiff whether it needed any specific test or evaluation, and did not limit Plaintiff's appeal only to "clinical evidence" nor did LINA mention "clinical evidence" in its initial letter. LINA did not identify what "diagnostic test results" it would specifically be interested in receiving, or why.

115. While LINA generically invited Plaintiff to submit "copies of any other diagnostic test results which document the severity of your condition to the extent that you are unable to perform the duties of your occupation or any occupation," LINA provided no guidance of what that generic request might refer to or what specific type of information it was looking for.

116. LINA did ask that Plaintiff submit "[a] *discussion* by your treating physician(s)":

> 1) of the medical evidence which prevents you from performing the duties of your occupation or any occupation" including any "current data sources used to make these determinations?"
>
> 2) "describing your current and future treatment plan(s)" including any "problems of treatment . . . treatment goals. . . treatment strategies for each goal. . . [and] how [] the treatment plan address[es] you returning to work" and the "specific/limitations/restrictions that preclude you from performing the duties of your regular occupation or any occupation. What specific essential job functions, activities of daily living, and social/recreational activities are you incapable of performing?"

117. LINA wrote, "In the absence of such report *we shall assume* that these revealed normal findings and unimpaired function" — despite the irrefutable documentation by objective medical evidence already in LINA's possession that Plaintiff had severe osteoarthritis / end-stage disease of the left hip on x-ray and on physical examination.

118. LINA did not and had never identified or prepared a comprehensive Rehabilitation Plan for Plaintiff, nor a Transitional Work Arrangement for Plaintiff.

119. Plaintiff requested from LINA a complete duplicate of the unedited original video tape from the Photofax Surveillance Corporation ("Photofax") 5-day surveillance commissioned by LINA, together with any field notes and descriptions of the surveillance procedures to retain in the claims file portion of the 'administrative record'.

120. LINA refused to obtain from Photofax or provide to Plaintiff a copy of the unedited video tape from the 5-day surveillance.

121. LINA similarly refused to obtain all other related documents, notes, writings, including electronic information from "Photofax" related to the surveillance and investigation of Plaintiff so that it could be included with the rest of the claim-related information ("Administrative Record"), thereby preventing Plaintiff from an adequate opportunity to fully address the assertions of alleged activity described in the report but not included on the selected highlights copied and sent to LINA.

122. Plaintiff made a direct request to PhotoFax for a copy of the unedited original surveillance footage, but PhotoFax also refused.

///

123. The regulations of the Secretary of Labor define at 29 C.F.R. § 2560.503-1 (m)(8) what are the "relevant" documents and information which must be provided to plan participants upon request, including those at (i) that were actually "relied on" by the decision maker in making the benefit determination, and (ii) those that were "submitted, considered, *or generated* in the course of making the benefit determination, *without regard to whether such document, record, or other information was relied upon* in making the benefit determination".

124. Upon information and belief, LINA's refusal to properly gather and maintain in its claim records an actual copy of all *"documents, records, and other information relevant to the claimant's claim for benefits"* described under the regulations at 29 C.F.R. § 2560.503-1 at (j)(3) and expressly defined under subsection (m)(8), is a violation of its fiduciary duties to maintain an accurate copy of the "Administrative Record."

125. Upon information and belief, LINA's failure to obtain information related to the claim generated by or on its behalf during the claim investigation and administration improperly truncated the "Administrative Record," and failed to provide Plaintiff with "reasonable access to" copies of said documents records and information, and risked — if not effectuated — a spoilation of evidence, frustrated and precluded an adequate appeal by Plaintiff of the true surveillance, and thus frustrated a full or fair review of the claim upon appeal.

126. Plaintiff is informed and believes and based thereon alleges that LINA thus intentionally truncated the "administrative record" by not including documents within the possession and control of agents employed by LINA to assist with investigating the claim, and thus documents within LINA's constructive control and possession.

127. Upon information and belief, LINA's failures and breaches of the ERISA regulations which form the minimum requirements and responsibilities of the claims administrator, and refusal to comply with the requirements of the regulations and information required by Title I of ERISA, justify appropriate relief by this court in its discretion, including but not limited to:

127-(1) *injunctive relief* under 502(a)(3) compelling the claims administrator to immediately obtain and provide Plaintiff with any and all documents, records, information, writings, including electronically stored, "relevant to" a claim being investigated and determined by LINA as it pertains to the surveillance requested by LINA and conducted by Photofax Inc. at LINA's request;

127-(2) a *502(c) penalty* remedy against LINA of up to $110 per day, per requested document or item under § 503 of ERISA and the claims regulations of § 2560.503-1 incorporated therein, from the date of Plaintiff's request to the date it is provided;

127-(3) *estoppel* of LINA to rely on the surveillance allegations that are not recorded, including but not limited to that which Plaintiff advised LINA was incomplete, misleading and/or false;

127-(4) *adverse inference* against LINA regarding all surveillance information for the concealment and/or spoilation of the requested evidence;

127-(5) *permanent injunction* against further such failure and refusal to gather and maintain all relevant information pertaining to any surveillance ordered by LINA related to participant's disability claims.

May-June 2006 - appeal number 1.

128. On February 23, 2006, Morpho confirmed to Plaintiff that it was still "unable to offer any opportunity" with the company because of "[Plaintiff's] physical limitations." [TN_2APP0412-417].

129. The start date of the 'any occupation' definition began during Plaintiff's 180-day "appeal" period.

130. In preparation for submitting his appeal, Plaintiff gathered records from his November 8, 2004 annual physical examination with Dr. Stacey Lin and underwent his next annual examination with Dr. Lin **December 19, 2005:**

> The patient was last seen by me November 8. At that time [he] needed a referral to go back to see Dr, Tohidi who has been managing him for severe osteoarthritis of his hip. Since then, Dr. Tohidi has left for Atlanta and so he [Nash] is here for medication refills. This is secondary to a motorcycle accident and again fracture. The question was whether he needed a hip replacement.
>
> The patient continues to have a **lot of pain, particularly decreased range of motion**, only about 5 degrees to lift his knee up off the table. There is no swelling or edema. He is still on the Vicodin. He

> avoids taking this medication due to decreased mentation and inability to drive on the medication.
>
> The pain is off and on. He has **good days and bad days.** What is helpful is if he reclines. **Sitting is the worst** in that he has pain as well as **decreased sensation** after about 15 minutes.
>
> No urinary difficulties; **particularly worse with different activities such as showering or putting on his socks.**

131. On **January 4, 2006**, Plaintiff consulted with orthopedic surgeon Patrick Padilla, M.D. on one occasion so as to obtain for LINA an updated left hip X-ray. The X-ray continued to show "severe degenerative arthritis with joint space narrowing, osteophyte formation."

132. Upon information and belief, osteophytes are bone spurs that have developed within the joint space after damage to a bone and/or has developed from friction of the bones rubbing together after osteoarthritis has worn away the hip cartilage that once protected and cushioned the joint.

133. Upon information and belief, bone-on-bone contact, friction or rubbing and the formation of bone spurs in the joint severely limit the motion of, and cause extreme pain in, the affected osteoarthritic hip joint.

134. Plaintiff was finally referred to a permanent local orthopedic specialist to follow up his care in San Diego, Dr. James Helgager. Dr. Helgager examined Plaintiff on **February 9, 2006**, and consistent with Dr. Tohidi and Dr. Padilla, noted "advanced osteoarthritis of the left hip" on radiographic examination.

135. Consistent with Dr. Tohidi, Dr. Lin and Dr. Padilla, Dr. Helgager also found on physical examination,

> "marked restriction of left hip motion . . . . The patient is not able to sit without reclining back because of the stiffness of his left hip"; "the patient cannot sit in a chair for any significant period of time and thus is not able to work."

136. Dr. Helgager completed LINA's "*Physical Ability Assessment*" (PAA) Form, checking off (✔) boxes on the form confirming that Plaintiff was limited to less than 2.5 hours in an 8-hour day of sitting, standing, walking, kneeling, and opined that Plaintiff could not perform climbing, balancing,

crawling, crouching or stooping, and confirmed that the restrictions and limitations were supported by objective medical evidence.

137. Plaintiff again saw treating physician Stacey Lin, on **March 13, 2006**, who concurred in the "severe left his arthritis," and who also opined, "given his level of pain and limitations, it does not look like he is able to significantly sit, bend, walk, kneel or reach, and especially any sort of . . extended hours."

138. Dr. Lin also completed for LINA a *Physical Ability Assessment* (PAA) form on **March 13, 2006**, confirming that Plaintiff's physical examination "*is unchanged since my first visit with him*" [on 11/8/04], and reiterated,

> "essentially, with his L[eft] severe hip pain, he cannot sit for a prolonged period of time. Anti-inflammatories do not help and narcotics affect cognitive function."

139. On **April 6, 2006**, Plaintiff underwent a left hip X-ray *with injection* under fluoroscopy, which demonstrated yet again the "severe degenerative disk disease of the left hip." On April 20, 2006, Plaintiff's new orthopedic hip specialist, Dr. Helgager, who confirmed that • the injection did not help, • that Plaintiff had no change in symptoms since January 2005, • has no positive response with PT or injections, • suffers pain because of the lack of hip motion and is unable to sit for prolonged periods, and • cannot flex his hip past 70 degrees (unable to bend it 90 degrees, required of upright sitting).

140. In March and June 2006, Plaintiff obtained the pharmacy records related to his regular refills of Vicodin, for submittal with his appeal.

141. On **May 15, 2006**, Plaintiff submitted the first part of his appeal of LINA's rationale for its adverse claim decision, and supplemented it by an addendum June 1, 2006.

142. Plaintiff's first appeal described his medical history beginning April 1998 [TN_2APP0135], inclusive of his measured Range of Motion (ROM) abnormalities compared with the normal range [TN_2APP 0135- 0142].

143. Plaintiff's first appeal included all serial radiographic (X-ray) reports between July 2003 and April 2006 [TN_2APP 0217- 0222]:

- 4/6/2006: "severe degenerative disk disease of the left hip".

• 8/8/2003: deformity of the proximal left femur" "severe osteoarthritis with near complete obliteration of the super lateral joint space of the left hip on upright views" [bone on bone]; IMP: "...changes of the left proximal femur with severe degenerative changes as described above"; "The standing AP hip views elicit severe degenerative arthritis of the left hip with complete loss of the articular space and bone-on-bone contact [in the weight bearing dome and in zone 3 of the acetabulum]. Due to the severe anteverted hips, he elicits 155 degrees to 160 degrees of femoral neck and shaft angle, which predisposes him to slight later subluxation [dislocation] of the hip bilaterally" [as read by Dr. Tohidi 8/8/03 and 8/14/2003]. [TN_2APP 0293 and 0291].

• 7/18/2003 ("old femoral neck fracture deformity", "osteophytosis and superior joint space narrowing. . . slightly increased compared with prior study"; Impression: Moderate to severe left-sided osteoarthritis slightly progressed compared with prior study.")

- - - - - - -

• 2/3/1998 "...proximal left femur show mild degenerative change with some subchondral sclerosis and osteophyte formation and slight joint space narrowing superiorly and laterally. . . . there is no localized destructive process" [read by radiologist Dr. Handy] [TN_2APP0272]; "slight narrowing of the lateral part of the joint space of the left hip with osteophyte formation and subchondral cyst formation in the acetabular region. There is also some oval shape to the femoral head and on the lateral there is thinning of the lateral femoral acetabular joint," [read by orthopedic surgeon Dr. Ozerkis, who in April 1998 followed Plaintiff for "increasing difficulty with his left hip with pain in the area and stiffness and difficulty tying his shoe laces", reduced hip flexion by 45 degrees, decreased external rotation by 25-30 degrees, a 45-degree reduction in internal rotation, a slight antalgic gait, with mildly painful and somewhat limited abduction and adduction. [TN_2APP0283].

144. Plaintiff's first appeal enclosed a full and complete copy of Plaintiff's existing medical records, including those from (1) Leonard R. Ozerkis, M.D., starting 1998 [TN_2APP0158-59]; (2) Behrooz Tohidi, M.D., from 8/8/2003 to 10/19/2005 [TN_2APP0294-0311]; (3) general family physician Dr. Duff [TN_2APP0260-0293 from February 1998 forward]; (4) Stacey Lin, M.D. [TN_2APP0312-0340]; (5) Patrick Padilla, M.D. [TN_2APP0342-0343]; (6) James Helgager, M.D. in 2006 [TN_2APP0344-0350].

/ / /

145. Plaintiff's first appeal organized into one section for LINA's convenience, a copy of each of the completed LINA forms including "Medical Request Form," "Follow-Up Medical Request Form," "Physical Ability Assessment" forms (dated 9/26/03, 10/1/03; 11/21/03, 1/16/04, 3/31/05, 10/19/05, 3/13/06, 3/22/06) [TN_2APP0223 - 0239]; along with Dr. Tohidi's opinion letter of 1/4/04 that discussed the nature of Plaintiff's hip disease and correlated symptomatology and limitations [TN_2APP0240].

146. Plaintiff's first appeal included a "Confidential" statement of his "Personal Information and Physical Limitations" [TN_2APP 0143 - 0147].

147. Plaintiff's first appeal included a seven-page (single spaced) written description of Plaintiff's "Professional History and Job Analysis", informing LINA that performance of his occupation required 50-plus work hours each week — the majority of the time requiring he remain seated in an office chair, plus extensive travel to customer or business partner offices throughout the United States, Europe and Asia" (Finland, Sweden, France, Germany, Korea, Japan, etc), 1-2 weeks per month — requiring additional prolonged painful sitting. [TN_2APP 0148- 0154]. Plaintiff's statement described in specific detail what he had difficulties with, restrictions from, and when and how often he developed substantial pain symptoms that forced cessation of the same postures or positions or activities. [TN_2APP0149 - 0154].

148. Plaintiff, who had undergone a "Functional Capacity Evaluation" ("FCE") on March 30, 2006, ordered by Dr. Helgager, to determine his work capacity in his usual and customary employment and any gainful employment in his field, submitted a copy of the 16-page detailed FCE report with his first appeal, inclusive of all measured data during the testing [TN_2APP0241-257], which detailed his limitations and inability to complete occupational requirements in the workforce.

149. With respect to his occupational requirements, Plaintiff's first appeal included a *"Details Report"* for private sector executives [TN_2APP0378-396] which confirms that his occupation primarily (80% of the time) consists of prolonged sitting [TN_2APP0389] with additional periods of walking and standing. Plaintiff also submitted the Occupational Outlook Handbook related to Top Executives [TN_2APP0397-404], which also reveals the substantial travel involved.

150. The information Plaintiff submitted supplemented the information LINA developed about occupations of Private Sector Executives or Vice President in his industry, or Financial Planner, for

which Plaintiff would allegedly have the education, training or experience transferrable skills. [TN_2APP0776-784]. LINA indicated however that all of the replacement occupations are also sedentary and would only produce monthly earnings of $6099, a mere 60% of the indexed covered earnings Plaintiff would have to make under the plan before he would be disqualified from the definition of totally disabled. [TN_2APP0784].

151. With respect to the surveillance conducted by **"Photofax, Inc."** on which LINA claimed to rely, Plaintiff specifically and in detail addressed the numerous *inaccuracies*, *false* statements, *misleading* descriptions or characterizations of "fact" about his alleged activities that were contained in the report and allegedly in the related footage. [TN_2APP-0156, 0157, 0158, 0159; TN_2APP 0167-0169, 0182-0183, TN_2APP0423-438, 0494]. This appeal information addressed, among other, the mischaracterization and outright falsity of allegations regarding Plaintiff's 'activities' and lack of correlation of the nature of his actual limited activities to the types of prolonged sustained postures, positions and activities which were required of his full time occupation or any sedentary or light occupation which he cannot tolerate. [TN_2APP0160; TN_2APP 0167-0169, 0175-0176, 0178-0179; TN_2APP0445-465, 472-492].

152. Plaintiff also presented a 15-page affidavit under oath [TN_2APP0193-208], a copy of which is attached as **Exhibit B** hereto, in which Plaintiff: (a) described details of his limitations and disability, (b) advised LINA that his condition since September 2003 was not improved, (c) attested to his history of failed intra-articular Corticosteroid treatment (Xylocaine and Depo-Medrol injections); (d) discussed the expected future surgery prospects and timing of a 'total hip' replacement in ten years with limited activity and positions that cause pain during the interim; (e) discussed the recommended annual medical follow-ups; (f) reminded LINA of the Social Security Administration determination that he is totally disabled from performing the material duties of any gainful occupation; (g) confirmed to LINA that contrary to its December 2005 assertion in the termination letter that it had not received Dr. Tohidi's completed *Physical Ability Assessment* (PAA) form, Dr. Tohidi's PAA had been faxed to LINA two separate times; (h) discussed the overall conclusion of the 4-hour FCE that was submitted [TN_2APP0240 -0257],attached as **Exhibit C** hereto, which indicated he was "unable to complete all tasks presented due to decreased AROM and pain in the left hip" [TN_2APP0246], and concluded

Plaintiff does not appear capable of performing an occupation; (i) Plaintiff also addressed the requirements of his occupation, compared to the his activities on the small sections of selected surveillance footage provided and the alleged activities that had been misrepresented (and not documented by or supported by any footage). [TN_2APP0204-0207].

153. Plaintiff's first appeal included a medical reference article on *Joint Motion Measurement* [TN_2APP 0210-0215], which listed the range of degrees of hip motion in a 'normal' hip compared to Plaintiff's significantly limited ROM as measured during his physical examinations by his treating hip specialists [TN_2APP0214].

154. Plaintiff's first appeal included Plaintiff's own "Analysis of Denial of Benefits Letter" about assertions made by LINA that were unsupported, misleading or false and contrary to actual evidence in the file [TN_2APP 0167-0171], a copy of which is attached as **Exhibit D** hereto.

Second denial letter

155. On **July 10, 2006**, LINA, through Ms. Medha Bharadwaj, refused to reverse its claim closure and benefits termination. A copy of the July 10, 2006 adverse decision is attached as **Exhibit E** hereto. This time, the stated reason was that:

(1) the physician examinations of Plaintiff in the claim file were either "too old," or those that Plaintiff underwent between December 2005 and April 2006 —including (3/2006 FCE)— were several weeks to several months after the last date that benefits had been paid (referring to the 11/30/2005 benefits check Plaintiff received) and thus impliedly "too late".

(2) it did not have "*medically supported limitations and restrictions* which would preclude you from performing the duties of your [allegedly] "light" occupation as Vice President" —"*Clinical findings* that would support the severity of your condition and functional deficits that would preclude you from performing your occupation as of November 30, 2005."

156. LINA included no discussion in its second denial letter of continuing to rely on the faulty surveillance, and included no discussion or analysis of, for instance, the fact that the video footage never showed Plaintiff performing prolonged sitting which is required of any sedentary or light occupation and which disabled him from his occupation, or the information shown by Plaintiff to be false and/or misleading. If LINA continued to rely on it, LINA did not so state, nor explain in what manner or why.

157. Upon information and belief, Plaintiff's limitations and restrictions were and are substantiated by both medically "objective" and "clinical findings" provided by Dr. Tohidi, Dr. Helgager, Dr. Padilla, Dr. Lin, numerous X-rays, the 4-hour FCE, which LINA also did not address, and the fact that the nature and location of Plaintiff's symptoms and limitations are classic for those that patients with severe hip disease suffer and from which they become disabled.

158. Plaintiff's "limitations and restrictions" were and are "supported" by a number of types of medical documentation, including but not limited to objective medical testing through X-rays, physical examination, trained medical specialist's opinions based on professional education, training and experience and their multiple examinations and follow up of Plaintiff, clinical presentation of the nature and type of symptoms that this level of disease typically causes, clinical history, marked range of motion limitations, and a Functional Capacity Examination.

159. LINA's second letter affirming benefits remained terminated, stated:

> "You may request a review of this decision by writing to the [LINA] Representative signing this letter at the address noted on the letterhead. The written request for review must be sent within 180 days of the receipt of this letter. In addition to any written comments, your request for review must include new documentation you wish us to consider.

160. On July 18, 2006, Plaintiff wrote to LINA addressing LINA's irrational approach of a review of a *degenerative* medical condition and resulting disability that ignored the medical history and development of the disabling condition, myopically only focusing on what medical record happened to exist on a day that later turned out to be the last day the insurance company sent out a monthly benefits check (end November 2005).

161. Plaintiff reiterated the preclusion by his severe osteoarthritis of being able to sit at an upright 90 degree angle or to even sit for prolonged periods. [TN_2APP1044 - TN_2APP1045].

162. Upon information and belief, LINA's occupational consultant admitted that the essential job functions of Plaintiff's occupation are *primarily sedentary* (with occasional lifting of 10 pounds —also within the sedentary strength category), and stated that generally, "sedentary occupations require sitting 6-8 hours" a day but that the occasional travel Plaintiff had to perform would also involve additional "light" strength tasks due to the walking and lifting during the period to and from the airport,

and in the airport, in addition to the sedentary upright prolonged sitting during meetings at the travel destinations.

163. Plaintiff again wrote to LINA on 7/28/06 outlining LINA's errors. [TN_2APP1051 - TN_2APP1053], and wrote on 9/8/06 requesting all of the new documents pertaining to his claim, and on 10/16/2006, again requested LINA obtain and provide to Plaintiff a copy of the original video surveillance footage.

164. LINA continued to refuse to obtain and provide to Plaintiff a copy of the unedited original surveillance footage.

Second appeal and 3rd denial

165. On **January 4, 2007**, Plaintiff submitted his second formal appeal, this time through counsel, addressing over the course of the 50 page detailed appeal cover letter and exhibits attached to it, each of the reasons stated by LINA in its second denial letter. A true and correct copy of the Second Appeal Letter dated January 4, 2007 is attached as **Exhibit F** hereto.

166. Plaintiff's second appeal submitted detailed descriptions of the various aspects of his occupation and those for which he would have transferrable skills such as top executives not only under the now-replaced 1991 Dictionary of Occupational Titles (D.O.T.), but its replacement, Occupational Information Network, ""O*NET" [TN_2APP0378-396], which is endorsed by, among other, the American Insurance Association, Health Insurance Association of America, Group Underwriter's Association of America.

167. Each of the alternative occupations as alleged at paragraph 150 hereinabove, are, like Plaintiff's regular occupation, *sedentary* as well, and thus require "mostly sitting, may involve standing or walking for brief periods of time," and are associated with annual earnings in which Plaintiff could not earn 80% of his indexed covered earnings alleged at paragraph 86 hereinabove. [TN_2APP0776-784]

168. Plaintiff's second appeal included (a) a table of exam dates [TN_2APP_Ex0011]; (b) a 42-page comprehensive medical chronology [TN_2APP_Ex0012-53], attached as **Exhibit G** hereto; (c) a time line that lists his follow-up medical examinations and disability assessments [attached as **Appendix A** to this Complaint, p 01-02]; (d) a follow up chart note of 10/23/2006 by Dr. Tohidi

regarding the history and physical Dr. Tohidi conducted of Plaintiff on 10/23/06 [TN_2APP_Ex0008-10]; (e) Dr. Tohidi's letter dated October 23, 2006 clarifying for LINA the nature of severe osteoarthritis of the hip joint and responded to LINA's denial letter [TN_2APP0001-04]; (f) a date listing of Plaintiff's medical visits and tests [TN_2APP_Ex0011]; (g) all medical records [TN_2APP0001-125]; (h) the materials and information submitted with his first appeal.

169. Plaintiff's second appeal also included a letter from Dr. Tohidi, also dated October 23, 2006 in which Dr. Tohidi provided his medical opinions about the limited and non-continuous activities he viewed on the video surveillance footage recording (4 hours from five separate days). Dr. Tohidi advised LINA the recorded footage showed that Plaintiff walked with a modified gait, limping, hyperextension, and that the 'activities' seen were not inconsistent with Plaintiff's disability claim and his reported activities [TN_2APP_Ex 0005-07].

170. By letter of February 21, 2007, the same person who issued LINA's second denial, Madja Bharadwaj, wrote, refusing to consider Plaintiff's second appeal.

171. By two consecutive letters dated 2/28/2007 and two months later, 4/20/2007, Plaintiff's counsel demanded that LINA consider the second appeal LINA *had authorized and invited him to submit*.

172. Plaintiff and his counsel were met by 'radio silence' from LINA and Ms. Bharadwaj.

173. Finally in May 2007, Plaintiff's counsel notified the California Department of Insurance (CDI) about LINA's refusal to communicate with Plaintiff and its refusal to accept a second voluntary appeal that it had invited Plaintiff to submit and which is permitted by LINA's own internal claim guidelines.

174. By May 24, 2007, the CDI had addressed LINA's stonewalling of Plaintiff with "LINA management," and on May 30, 2007, LINA's in-house counsel advised Plaintiff's counsel that LINA would review Plaintiff's second appeal information.

175. Plaintiff continued to regularly followup with his treating hip specialists in mid-June 2007, who noted Plaintiff's symptomatology unchanged from before, continuing hip disability, significant pain and "significant limitation of hip motion" with very abnormal flexion, rotation, abduction and adduction, with slightly worse X-ray findings than one year before. Plaintiff's "Joint space superiorly" remained "essentially obliterated," providing clear objective medical evidence of bone-on-bone pain-producing

pressure and friction that consistently produces Plaintiff's severe hip pain with any prolonged sitting and standing.

176. Plaintiff supplemented his second appeal materials on June 26, 2007 and July 7, 2007, with his updated medical records and pain prescription records.

177. LINA sent an incomplete set of unspecified records to an "outside Peer Reviewer" with "Intracorp."

178. Upon information and belief, "Intracorp" d/b/a "International Rehabilitation Associates, Inc.," and is a wholly-owned subsidiary of CIGNA.

Third letter confirming claim termination

179. On **7/18/07, received by Plaintiff on 7/23/07**, LINA issued a third adverse benefits determination latter, pointing solely to a string of unsupported conclusions argued by LINA's "medical director" paper reviewer. A copy of the third denial letter is attached as **Exhibit H** hereto.

(1). This denial letter alleged that its new hired **"**Peer Reviewer attempted to discuss Mr. Nash's case with Behrooz Tohidi, MD on July 11, 2007 and July 12, 2007" but that Dr. Tohidi "was unavailable and messages were left with Dr. Tohidi, however, he did not receive a return call.**"**

(2). LINA alleged that it's hired "Peer Reviewer" had commented on the alleged activities on the five-day video surveillance, but noticeably made no comment about receiving, reviewing or assessing Plaintiff's appeal comments that specifically addressed the misleading and false assertions in the surveillance report.

(3) LINA alleged that the "Peer Reviewer's" "Opinion" was that "there was no medical provided that documented any significant physical or cognitive limitations that would preclude working activities ": he argued, "although [it would be] unusual, it is possible to sit with the hip flexed at not more than approximate 45 degrees," —implying his conclusion that Plaintiff could perform each of the material duties of his or some other unidentified sedentary occupation at a desk simply by leaning back 45 degrees or more, also implying that Plaintiff must not have attempted that accommodation to enable him to continue performance of his occupation.

180. Upon information and belief, LINA either does not understand or want to understand that the issue is not simply reclining to 45 degrees, but that Plaintiff must recline in a way such that the angle from his leg being straight *to a position where it produces pain* cannot be more than 45 degrees and that leaning a seat back 45 degrees (or more) will not help unless it also moves Plaintiff's left leg away from his torso.

181. At no time did LINA conduct additional testing, perform additional hip X-rays, functional capacity evaluations, work tolerance testing, or conduct prolonged positional testing in upright sitting and standing over an 8-hour day (or Plaintiff's 10-hour work day), or on consecutive days, and did not conduct an independent medical examination.

182. At no time did LINA or its reviewer ever review the actual films of Plaintiff's X-rays that confirm the loss of articular space superiorly, resulting in bone-on-bone friction and rubbing between Plaintiff's acetabulum in the hip joint and the head of Plaintiff's left femur in the sitting position.

183. At no time did LINA ever show Plaintiff's ability to work enough hours sitting for prolonged periods or even sitting all day long to earn at least 80% of his monthly *indexed covered earnings* alleged at paragraphs 84-86 hereinabove.

184. Implying that all medical and testing information submitted in appeal of (i.e., after) a benefits termination is irrelevant, LINA's alleged "medical director" parroted LINA's July 10, 2006 denial argument, alleging that "most of" Plaintiff's medical information was allegedly several years old and prior to the last disability benefits payment; and that Plaintiff's medical examinations and FCE (between December 2005 to April 2006) are "several weeks to several months" later than LINA's termination decision (of 12/13/05). LINA's "medical director" erroneously declared that Plaintiff was not considered a surgery candidate until a few weeks *after* LINA's termination letter, even though the medical evidence from Dr. Ozerkis and Dr. Tohidi early on shows otherwise.

185. LINA myopically adopted the hired opinion's arguments wholesale and refused to reinstate the claim or pay Plaintiff's disability benefits. LINA concluded, "the medical records in file do not support severity of any condition as of November 30, 2005" (date of the last monthly check received by Plaintiff), that would "preclude" Plaintiff from performing his occupation.

///

186. On August 29, 2007, Plaintiff, who investigated the assertion in the third denial letter that the Peer reviewer had allegedly called Dr. Tohidi twice and received no return call, notified LINA that Dr. Tohidi's office had reported receiving only one message from LINA's reviewer, that it was approximately one week before the final denial letter was sent, that it was when Dr. Tohidi was out of town, that LINA's "Peer Reviewer" had left no question or request for information nor identified any specific subject matter he wished to discuss, that the caller had not followed up with any fax or letter and had made no effort to schedule a telephone appointment with Dr. Tohidi's office for a time after Dr. Tohidi returned to town. Plaintiff expressed his concern that LINA had not notified Plaintiff or his counsel at any time of the alleged desire of the Reviewer to speak with Dr. Tohidi or complied with Dr. Tohidi's stated request to LINA that all inquiries should be submitted in writing to avoid misconstruction and misinterpretation of questions and answers. A true and correct copy of Plaintiff's August 29, 2007 letter is attached as **Exhibit I** hereto.

187. LINA ignored the content of Plaintiff's letter and returned the original to Plaintiff's counsel.

188. On September 17, 2007, Plaintiff's counsel resubmitted Plaintiff's letter to LINA, reiterating the concerns Plaintiff had raised. A true and correct copy of the September 17, 2007 letter is attached as **Exhibit J** hereto.

189. LINA did not respond and has ignored both the concerns of Plaintiff and the concerns raised by Plaintiff's counsel.

190. This is not the first time LINA has engaged in manipulative self-interested claims handling practices and rationale.

191. On April 25, 2008, LINA's actions in denying disability benefits attracted the attention of CNN which aired a program on Good Morning America, http://abcnews.go.com/Video/playerIndex?id=4724275.

192. LINA's termination of Plaintiff's claim was and is arbitrary and capricious and is not supported by substantial evidence in the record as a whole, but is based on argument and an ostrich-like ignoring of substantial evidence clearly supportive of Plaintiff's disability from performing all of the material duties of his own occupation or any occupation for which he is educated trained and experienced that would pay him at least the monthly amounts of $10,000+ to $11,000 alleged at paragraph 86 hereinabove.

193. Plaintiff seeks reinstatement of his claim and payment of all past due monthly benefits beginning December 2005 to date of the court's judgment in this case.

194. Plaintiff also seeks declaratory relief as to his entitlement to future benefits under the policy as long as he remains totally disabled under the terms of the policy since his condition is permanent and degenerative, at least until such time as it is determined by his treating specialists that it is the medically appropriate time to undergo a total hip replacement, and he has undergone such replacement and the appropriate convalescent period to adequately recover from the replacement, *and if then able*, perform each of the material duties of his or another occupation for which he is educated trained and experienced and can earn 80% of his (at that time)-indexed covered earnings.

195. Plaintiff seeks any other appropriate equitable relief the court deems appropriate including enjoining LINA from further attempts to modify or amend the insurance contract which covers his disability, enjoining LINA from violation of the notice and disclosure requirements mandated by the Secretary's Regulations with respect to documents requested by Plaintiff related to his claim.

196. Plaintiff is informed and believes and thereon alleges that Plaintiff has a right to equitable *disgorgement of profits* earned by LINA by its retention of the benefits that should have been paid to Plaintiff beginning December 2005 forward, together with consideration of the rate that compensates Plaintiff for the losses incurred as a result of nonpayment of ERISA benefits. *Dobson v. Hartford Fin. Servs. Group*, 389 F.3d 386 (2nd Cir 2004).

197. Thus, Plaintiff seeks an award of *pre*-judgment interest on all delayed benefits from the date such benefits payments were due beginning December 2005, in an amount and at the rate lying within the Court's discretion, including the above-alleged disgorgement of profits earned at the rate of increase LINA has earned on its assets to the extent that rate of increase exceeds either the prime rate or the 10% interest rate provided under the California Insurance Code.

198. In the alternative, at the court's discretion, Plaintiff seeks as *pre*-judgment interest, the rate of 10%, consistent with the California Insurance Code.

199. Plaintiff also seeks *post*-judgment interest on the benefits from the date of judgment until the date they are paid at the Order of the court pursuant to 28 U.S.C. §1961.

///

200. Plaintiff has retained the services of legal counsel and has necessarily incurred and will continue to *incur attorney's fees and costs* in preparation for and in the prosecution of this action, all in a final amount which is currently unknown.

201. 29 U.S.C. §1132(g)(1), ERISA § 503(g), entitles a Plaintiff who prevails in obtaining any of the benefit for which the Plaintiff brought suit to an award of a reasonable attorney's fee and costs of action under the remedial purposes and policies of ERISA

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. For payment by the LTD Plan through the LINA insurance policy that governs Plaintiff's claim past outstanding monthly disability benefits beginning December 2005 to date of judgment;
2. *Pre*-judgment interest at a rate earned by LINA on its own investments, within the Court's discretion, from the date benefits became due to the date of judgment;
3. *Post*-judgment interest at the appropriate rate under 28 U.S.C. § 1961, from the date of judgment to the date the Court establishes for payment of the judgment amount;
4. For a finding that Plaintiff remains totally disabled under the terms of the LTD Plan and that Plaintiff is entitled continue receiving disability benefits to age 65 so long as he remains so disabled under the terms of the Plan.
5. To enjoin LINA as necessary from any further efforts to modify or amend the LTD Plan by misconstruing or amending the policy including the imposition of additional and external terms, conditions, restrictions, limitations not contained in the terms of the policy, or to refuse to send requested documents needed to appeal an adverse claim decision.
6. For reasonable attorneys' fees and costs of suit under ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1);

///

///

7. Such other appropriate equitable relief as the Court deems proper including but not limited to (a) *injunctive relief* under 502(a)(3) compelling LINA to immediately obtain and provide Plaintiff with any and all video recordings, footage, field notes, documents, records, information, writings, including electronically stored, to, from or generated by Photofax Inc., related LINA's surveillance investigation of Plaintiff through Photofax Inc.; (b) a *502(c) penalty* remedy against LINA of up to $110 per day, per requested document or item under § 503 of ERISA and the claims regulations of § 2560.503-1incorporated therein, from the date of Plaintiff's multiple requests for the original video footage recorded by Photofax Inc., to the date it is provided; (c) *estoppel* of LINA to rely on the surveillance information, that contradicts Plaintiff's advising LINA the reported 'activity' is false, or alternatively, imposing an *adverse inference* against LINA regarding all surveillance information that has been asserted about the surveillance that is not supported by actual recorded footage, for the concealment and/or spoilation of the requested evidence; (d) *permanent injunction* against further such failure and refusal to gather and maintain all relevant information pertaining to any surveillance ordered by LINA related to participant's disability claims.

8. For any other appropriate equitable relief under ERISA § 502(a)(3) related to improper claims handling or breaches of fiduciary duty and/or acts or practices which violate ERISA and/or the terms of the LTD Plan.

MILLER, MONSON, PESHEL, POLACEK & HOSHAW

Dated: May 19, 2008

By: Susan L. Horner
Susan L. Horner
Attorneys for Plaintiff, Todd Nash

\\SD1\WPServer\LIT\LITM-R\NASH, TODD M\LITIGATN\Pleadings\Nash v LINA_Final_5-19-08.wpd

APPENDIX B — LIST OF EXHIBITS

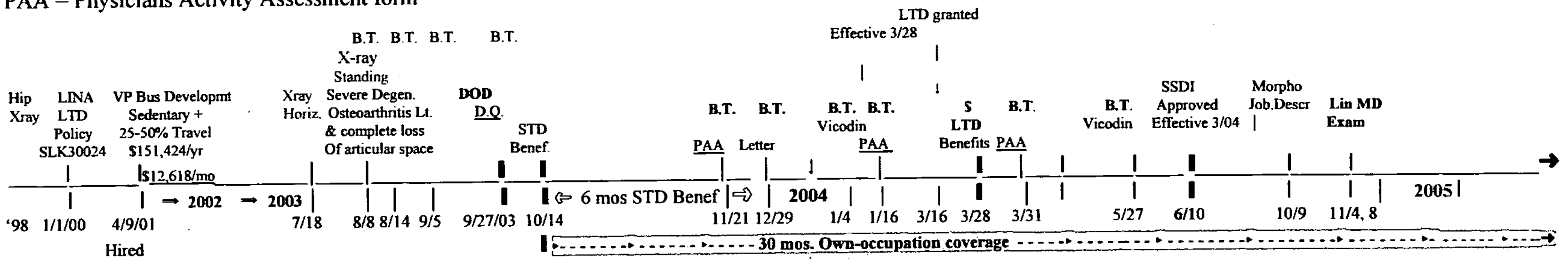
Appendix A to Complaint: Time Line from Plaintiff's appeal

Exhibit A:	First Adverse decision terminating LTD benefits, dated December 13, 2005, from Stephen Eccles, LINA, to Plaintiff
Exhibit B:	Todd Nash's May 15, 2006 15-page affidavit under oath
Exhibit C:	March 30, 2006 16-page Functional Capacity Examination report
Exhibit D:	Todd Nash's "Analysis of Denial of Benefits Letter"
Exhibit E:	LINA's second adverse decision dated July 10, 2006
Exhibit F:	Second Appeal cover letter dated January 4, 2007, from Miller Monson Peshel Polacek & Hoshaw to LINA
Exhibit G:	Comprehensive Medical Chronology, 42 pages, submitted as part of January 4, 2007 second appeal
Exhibit H:	LINA's third adverse decision dated July 18, 2007, 17 pages
Exhibit I:	Letter, August 29, 2007, from Todd Nash to LINA
Exhibit J:	Letter, September 17, 2007, from Miller Monson Peshel Polacek & Hoshaw to LINA

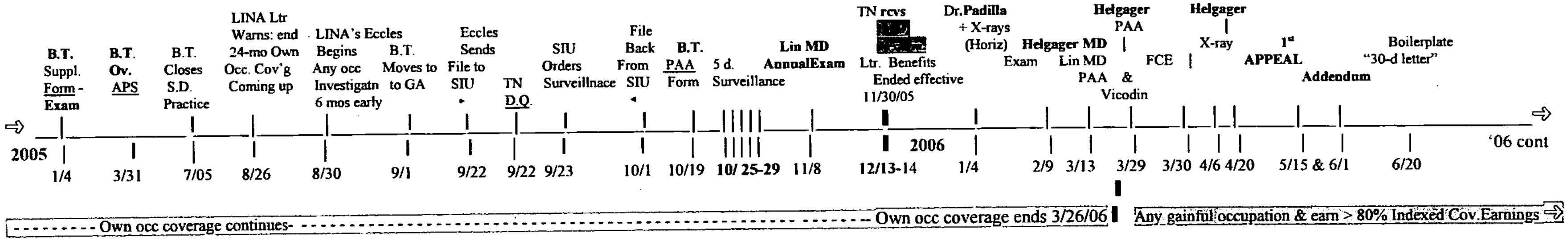
COMPLAINT APPENDIX A

TIME LINE OVERVIEW

Administarr (subsid=Morpho Technologies(client)
B.T. = Behrooz Tohidi, MD
D.Q. = Disability Questionnaire
PAA = Physicians Activity Assessment form


LTD granted
Effective 3/28
Hip Xray
LINA LTD Policy SLK30024
VP Bus Developmt Sedentary + 25-50% Travel $151,424/yr
$12,618/mo
Xray Horiz.
B.T. B.T. B.T. B.T.
X-ray Standing Severe Degen. Osteoarthritis Lt. & complete loss Of articular space
DOD D.Q.
STD Benef
B.T. PAA
B.T. Letter
B.T. B.T. Vicodin PAA
$ LTD Benefits
B.T. PAA
B.T. Vicodin
SSDI Approved Effective 3/04
Morpho Job.Descr
Lin MD Exam
'98 1/1/00 4/9/01 → 2002 → 2003 7/18 8/8 8/14 9/5 9/27/03 10/14
Hired
⇦ 6 mos STD Benef ⇨
11/21 12/29 2004 1/4 1/16 3/16 3/28 3/31 5/27 6/10 10/9 11/4, 8 2005
30 mos. Own-occupation coverage

Antalgic, intoed gait; shortening to the L hip;
Marked limitation of ROM
Severe L Hip pain w/ sitting longer then 30-45 min; w/ walking > 1/4 mi; w/ standing & climbing stairs
Nonresponsive to cortisone injections; cannot take NSAIDS/antiinflammatories
No stooping, crouching, crawling, climbing, balancing, reaching below the waist, working extended hours, exposure to vibration
Lifting or carrying restricted to occasional up to 10 pounds only (no lifting from floor level b/c of ROM limitations required w/ bending)
Restriction: No lifting of 11 or greater pounds
Restrictions/limitations: sit, stand & walk, < 2.5 hrs in 8-hr day;
No activities that taking of narcotic pain medications (vicodin) would render hazardous. Narcotic medication effect on cognitive abilities
Can't work and take narcotic pain medications


B.T. Suppl. Form - Exam
B.T. Ov. APS
B.T. Closes S.D. Practice
LINA Ltr Warns: end 24-mo Own Occ. Cov'g Coming up
LINA's Eccles Begins Any occ Investigatn 6 mos early
B.T. Moves to to GA
Eccles Sends File to SIU
TN D.Q.
SIU Orders Surveillnace
File Back From SIU
B.T. PAA Form
5 d. Surveillance
Lin MD AnnualExam
TN rcvs [redacted] Ltr. Benefits Ended effective 11/30/05
Dr.Padilla + X-rays (Horiz)
Helgager MD Exam
Lin MD PAA & Vicodin
Helgager PAA
FCE
Helgager X-ray
1st APPEAL
Addendum
Boilerplate "30-d letter"
2005 1/4 3/31 7/05 8/26 8/30 9/1 9/22 9/22 9/23 10/1 10/19 10/25-29 11/8 12/13-14 2006 1/4 2/9 3/13 3/29 3/30 4/6 4/20 5/15 & 6/1 6/20 '06 cont
Own occ coverage continues- Own occ coverage ends 3/26/06
Any gainful occupation & earn > 80% Indexed Cov.Earnings

COMPLAINT APPENDIX A

2006

- 6/9 — "Light" Vicodin Refill
- 6/30 (1044 & 1066) — **Occup. Rev.** Essential Job Fx **Primarily Sedentary** w/ Occ lifting 10# & travel is in To Sev.mos after Uses DOT & DOH
- **7-10-06** (1026 & 1061-63) — **2nd Denial** (2-3pp) Reason: MD exams Too old, or those From 12/05-4/06 & 3/06 FCE too Late by Sev.weeks Benefits end Need "medically supported Limitations & restrictions which Would preclude U frm performing the duties of your 'light' occ as VP. [No description of what specifically LINA wants.]
- 7/18 (1056) — Alan Ey Sedentary Occs require Sitting 6 - 8 hrs Errors
- 7/24 (1042) — Nash ltr Re CIGNA
- 7/28 (1051) — F/u
- 8/10 — Lin exam
- 8/19 — Errors Vicodin Refill
- 9/28 (1039) — Nash Re CIGNA Letters:
- 10/23 — B.T. F/u exam 1) status of medical condition 2) observations of surveillance Video
- 12/20 — Denial Vicodin Refill

2007

- 1/4/07 — Appeal Of 7/10/06 Letter

Any Occupation coverage period

"unable to perform all the material duties of any occ for which he is or may reasonably become qualified based on ed./train/experience

Or Unable to earn 80% or more of his Indexed Covered Earnings

W:\LIT\LITM-R\NASH, TODD M\LETTERS\Attachment time line.wpd

EXHIBIT A

EXHIBIT A

Stephen L. Eccles, ALHC
Claim Manager
CIGNA Disability Management Solutions

CIGNA Group Insurance
Life · Accident · Disability

December 13, 2005

12225 Greenville Ave.
Suite 1000, LB179
Dallas, TX 75243
Telephone 800.352.0611 Ext. 1292
Facsimile 860.687.9620
stephen.eccles@cigna.com

TODD NASH
2730 FERNGLEN ROAD
CARLSBAD, CA 92008

RE: Claimant : Todd Nash
Policy No : SLK 30024
Policyholder : Administaff of Texas, Inc.
Life Insurance Company of North America

Dear Mr. Nash:

We carefully reviewed your claim under the above captioned policy and must deny your claim for benefits beyond 11.30.2005.

In order to be eligible for benefits you must satisfy the policy definition of disability defined as follows:

Definition of Disability/Disabled

"The Employee is considered Disabled if, solely because of Injury or Sickness, he or she is:

1. unable to perform the material duties of his or her Regular Occupation or a Qualified Alternative; or
2. unable to earn more than 80% or more of his or her Indexed Earnings.

After Disability Benefits has lasted 30 months, the Employee is considered Disabled if, solely due to Injury or Sickness, he or she is either:

1. unable to perform the material duties of an occupation for which he or she is, or may reasonably become, qualified based on education, training or experience; or
2. unable to earn 80% or more of his or her Indexed Covered Earnings.

The Insurance Company will require proof of earnings and continued Disability."

Your policy also contains the following provision:

Regular Occupation

"The occupation the Employee routinely performs at the time Disability begins. In evaluating the Disability, the Insurance Company will consider the duties of the occupation as it is normally performed in the general labor market in the national economy."

Overview of Eligibility of Benefits

EXHIBIT A-1

"CIGNA" and "CIGNA Group Insurance" are registered service marks and refer to various operating subsidiaries of CIGNA Corporation. Products and services are provided by these subsidiaries and not by CIGNA Corporation. These subsidiaries include Life Insurance Company of North America, CIGNA Life Insurance Company of New York, and Connecticut General Life Insurance Company.

We reviewed the following information in conducting our review:

1. A Physical Ability Assessment from Dr. Tohidi completed 10.19.05
2. An Attending Physician statement completed by Dr. Tohidi on 3.31.05
3. Disability Questionnaire signed 9.22.05
4. Tax returns for 2004
5. Surveillance conducted from 10.25.05 through 10.29.05

On 8.30.05, we sent a letter to you requesting you complete an Activity of Daily Living Questionnaire and a Disclosure Authorization.

Dr. Tohidi states that you have hip pain secondary to severe osteoarthritis on his Attending Physician statement dated 3.31.05. He notes you have pain and limited motion in the left hip. As of that date, your last office visit was 1.4.05 and you saw him every 3-6 months.

He provided a Physical Abilities Assessment on 10.19.05 where he states you have osteoarthritis in your left hips, and comments that it is severe.

We attempted to get office notes from Dr. Tohidi and he has not responded to our request. We also attempted to obtain records from Dr. Ajir and Dr. Lin.

On 11.28.05, we sent you a letter requesting these records by 12.12.05 and to call our office by 12.8.05 to ensure that we received the records. You called our office on 11.30.05 and provided phone numbers for the doctors and said we could obtain the records from them directly. We faxed a request for their records on 11.28.05 using the restricted authorization you had provided for us. Your authorization limited release of medical records to those directly relating to your disability.

Dr. Ajir responded to our request for records on 12.5.05, but the last visit you had with this office was 11.18.03.

Dr. Lin never responded, nor did Dr. Tohidi.

Surveillance was conducted for a period of five days. During this time, you were observed doing the following activities:

Tuesday, 10.25.05	• Driving to and shopping at Home Depot in Carlsbad • Carrying a 4' x 8' sheet of drywall in the store, loading it in your car and unloading it at home; during this activity, you bent at the waist and lifted the drywall with both hands. While at home, you lifted the sheet of drywall over your head as you carried it across your street and up your driveway • Unloaded car, including scrap pieces of plywood

	• Driving to Blockbuster's in Carlsbad and walking to return a movie • Shopping at True Value hardware adjacent to Blockbuster
Wednesday, 10.26.05	• Talking with construction workers around your home • Driving to and entering a building on Jefferson in Carlsbad where you stayed approximately 1¾ hours • Picking up a male child at a Church on Fire Mountain in Carlsbad • Shopping at True Value Hardware in Carlsbad • Walking around your residence and talking with various construction workers and neighbors • Cutting a piece of PVC pipe in your garage using both hands and standing up while cutting the piece • Carrying a shovel and digging with the shovel in an area where cement was being poured • Carrying a bucket of dirty water out of the garage and dumping it on the grass in front of your home • Climbing a ladder in your garage and reaching overhead to retrieve an object that was stored there • Carrying a level from your garage to an area where workers were apparently installing a fence • Carrying pieces of 2" x 4" lumber and a piece of lattice from your garage to your trashcan • Filling a bucket with water, carrying it to the bottom of a hill in front of your house and dumping it out • Putting a plastic sheet over rocks in your driveway. Using both feet to scrape cement off the driveway and washing it away
Thursday, 10.27.05	• Working with the fence posts using a drill • Carrying wood to the work area in your yard • Leveling dirt around the fence area with both feet • Carrying paper towels and duct tape to the workers at your residence • Taking a trash can that was full from the house to the trash receptacles at the side of your home and dumping it out • Traveling to Witch Creek Winery where you proceeded to work from approximately 10:30 am until you left at approximately 2:30 pm. During this time you were observed stirring large vats with a stick using both hands and standing during this activity, using a hose to wash out a bin that apparently had grape juice in it, pulling a large bin out onto the sidewalk and pushing it to the other side

	of the building against the wall, hosing out a square bin that was full of grape juice, lifting plywood and walking over uneven ground and scrubbing a large rectangular bin with a brush
Friday, 10.28.05	• Pushing a wheelbarrow down the hill from your residence to a rock pile on the street to the right of your residence • Loading a bucket with rock from the pile, putting it in the wheelbarrow and wheeling it back up the driveway • Carrying the bucket back to the pile of rocks in the street
Saturday, 10.29.05	Trip to the San Diego Zoo. You remained at the zoo from 9:16 am until 1:00 p.m. During this time, you were observed doing the following: • Unloading strollers from your vehicle • Pushing a double stroller with children in it • Walking up a hill pushing the stroller with two children • Walking to numerous exhibits in the zoo, up and down hills, etc. • Running up a fairly steep hill with the double stroller (no children were in it at this time) • Lifting a small boy with both hands up onto a railing to observe an animal display • Walking up a steep hill that was restricted to anyone in a wheel chair

The person conducting the surveillance said you walked with a normal gait and exhibited no observable limitations in your motions while working, walking, bending and lifting. He obtained a total of 240 minutes of video recording of you performing the activities noted above.

Summary

After review of the medical information in your claim file and the surveillance tapes, it appears you have the capabilities working in your normal occupation, as defined in the national economy and in fact, may be working in another occupation at Witch Creek Winery.

We have no medical evidence to show that you are disabled at this time from working in your Regular Occupation and therefore, your benefits are denied.

Request for Reconsideration (Appeal)

If you disagree with our determination and intend to appeal this claim decision, you must submit a written appeal. This appeal must be received by us within 180 days of receipt of this letter and should be sent to the Life Insurance Company of North America representative signing this letter to the address noted on the letterhead.

You have the right to submit written comments as well as any new documentation you wish us to consider. If you have additional information, it must also be sent for further review to the address noted on this letterhead, within 180 days of receipt of this letter.

Additional information includes, but is not limited to: physician's office notes, hospital records, consultations, test result reports, therapy notes, physical and/or mental limitations, etc. These medical records should cover the period of January 1, 2005 through present. You may also wish to have your physician(s) provide some or all of the following:

Copies of any other diagnostic test results which document the severity of your condition to the extent that you are unable to perform the duties of your occupation or any occupation. Please include copies of any recent test results performed (in the last 6 months). In the absence of such report we shall assume that these revealed normal findings and unimpaired function.

Specific/limitations/restrictions that preclude you from performing the duties of your regular occupation or any occupation. What specific essential job functions, activities of daily living, and social/recreational activities are you incapable of performing?

A discussion by your treating physician(s) of the medical evidence which prevents you from performing the duties of your occupation or any occupation. What are the current data sources used to make these determinations?

A discussion by your treating physician(s) describing your current and future treatment plan(s). What are the problems of treatment? What are the treatment goals? What are the treatment strategies for each goal? How does the treatment plan address you returning to work?

Under normal circumstances, you will be notified of a decision on your appeal within 45 days of the date your request for review is received. If there are special circumstances requiring delay, you will be notified of the reason for delay within 30 days of receipt of your request, and every 30 days thereafter. A final decision will be made no later than 90 days.

Please note that you have a right to bring legal action regarding your claim under the ERISA section 502(a) if your appeal is denied. Unless special circumstances exist, this administrative appeal process must be completed before you begin any legal action regarding your claim.

If you believe all or part of your claim has been wrongfully denied or rejected, you may have the matter reviewed by contacting the:

CA Dept of Insurance

Consumer Claim Practices Review Unit
300 S. Spring St., South Tower
Los Angeles, CA 90013

Within CA, call (800) 927-HELP (4357) or 800-482-4TDD for TDD.
Out of State, dial (213) 897-8921.
Requests can be sent by fax to (213) 897-5961

Nothing contained in this letter should be construed as a waiver of any rights or defenses under the policy. This determination has been made in good faith and without prejudice under the terms and conditions of the contract, whether or not specifically mentioned herein.

Please review your insurance booklet, certificate or coverage information available from your employer to determine if you are eligible for additional benefits.

Should you have any questions, please do not hesitate to contact me at 1.800.352.0611 ext. 1292.

Sincerely,

Stephen L. Eccles, ALHC
Claim Manager

EXHIBIT
B

EXHIBIT B

EXHIBIT B

GENERAL AFFIDAVIT
BEFORE NOTARY

STATE OF CALIFORNIA)
)
COUNTY OF SAN DIEGO)

Before the undersigned, an officer duly commissioned by the laws of the State of California, on this 15 day of MAY, 2006, personally appeared the Declarant Todd Mitchell Nash who having been first duly sworn or having duly affirmed to tell the truth depose and says:

My name is Todd Mitchell Nash.

My date of birth is November 25, 1963.

I live at 2730 Fernglen Road, Carlsbad, CA 92008. I have lived at this address since 1996.

I am approximately five feet eight inches tall. I weight approximately 185 pounds.

I am disabled. I have been diagnosed with Severe Osteoarthritis of my left hip. I was originally diagnosed with Osteoarthritis of my left hip in approximately 1998.

I generally walk with a limp in my left leg due to the limited range of motion and pain in my left hip. At times it is conspicuous and at other times inconspicuous.

I am unemployed because of my disability.

I am unable to work because of my disability.

I am currently receiving Social Security Disability Insurance benefits because of my disability.

I became disabled under the Social Security Administration rules on September 26, 2003.

I have been receiving Social Security Disability Insurance benefits since March 2004 and continue to receive these benefits.

I became disabled under the terms of Life Insurance Company of North America policy SLK-030024 on September 29, 2003. My condition has not significantly gotten worse since September 2003. My condition has not improved since September 2003. I have not had surgery on my left hip. My condition is the same as it was in October 2005. This is documented in the medical files that are currently in CIGNA's possession and those that accompany my Request For Reconsideration (Appeal) for benefits.

Prior to March 1, 2006, I obtained health insurance from Pacificare HMO. Throughout the years 2003, 2004, and most of 2005, I was being treated for my hip illness by Dr. Behroz Tohidi, an orthopedic surgeon.

I ceased working at Morpho Technologies due to severe osteoarthritis in my left hip. The result of this condition was and continues to be severe pain and significantly limited range of motion of my left hip. Dr. Tohidi advised me to significantly limit my activity that burdens my left hip and causes pain. This recommendation has been documented on CIGNA's Physical Ability Assessment form.

Dr. Tohidi advised me that one day I will need to have a total hip replacement but that I should postpone the surgery for as long as possible. Dr. Tohidi recommended a conservative course of action in treating my hip illness due to my young. He recommended postponing surgery until I could not stand the pain any longer despite modification of my activities. This was due to the risks involved in the surgical procedure and the need to minimize the number of reversion surgeries in the future – preferably to have only one reversion surgery and not two or three since subsequent reversion surgeries would likely come at an age in life when my risk of death from the surgery is significantly increased. Based on all of the facts and circumstance, Dr. Tohidi recommended postponing the surgery until a later date to be determined collaboratively between Dr. Tohidi and myself.

Dr. Tohidi recommended that I follow up with him on an annual basis unless I had a change in condition that created the need to see him sooner. I asked to see him more often so that I could continue to have medical data to support my disability claim. He agreed and suggested to see me every six months to a year.

In mid 2005, Dr. Tohidi informed me that he was relocating his practice from California to Georgia. I was informed by my primary care physician, Dr. Stacey Lin, that referrals to orthopedic surgeons where not available for the purpose of simply providing input to my disability insurance company.

I contacted Dr. Tohidi's office in Georgia and based on that correspondence, Dr. Tohidi provided me with an updated CIGNA Physical Abilities Assessment Form. This form was signed by Dr. Tohidi on October 19, 2005. I faxed this form to Mr. Eccles on October 19, 2005.

On December 14, 2005 I called Dr. Tohidi's office in Georgia and asked them why they had not responded to Mr. Eccles' request for medical information. The office manager informed me that she had twice faxed Mr. Eccles the CIGNA Physical Abilities Assessment Form. I informed her that Mr. Eccles wanted a copy of my office notes in addition to the form. She told me that she was unaware that he wanted any other information from my file.

In multiple conversations with CIGNA employee Steve Eccles, and in a letter from him dated November 28, 2005, I was informed that if I was unable to get new office notes that the existing medical information in my file would be used. Mr. Eccles never informed me that if no new office notes were provided, that he and the claim team would consider this reason for denial of the claim based on lack of medical information. If Mr. Eccles had advised me that this would be the case then I certainly would have obtained new medical information even if I had to obtain it without use of my health insurance. Mr. Eccles never informed me that CIGNA wanted or needed any specific information except what was on the CIGNA forms.

Despite the limit of information from medical professionals, CIGNA has neither offered nor provided medical examinations despite my continued communication to Steve Eccles that my own insurance was limiting my ability to see a specialist without a change in my condition or need for a change in my treatment plan.

On December 19, 2005 Dr. Stacey Lin, my primary care physician, agreed to refer me to a new orthopedic surgeon due to Dr, Tohidi no longer being available. I was referred to Dr. Patrick Padilla.

On January 4, 2006, Dr. Padilla, an orthopedic surgeon, examined me. Dr. Padilla prescribed me the anti-inflammatory Naprosyn but I was later advised by my pharmacist not to take the medication due to my aspirin allergies. Dr Padilla recommended a bone resurfacing procedure rather than a total hip replacement as it is designed to treat younger patients like myself. However, this procedure has not yet been approved by the Federal Drug Administration and is currently undergoing clinical trials in the United States and Europe. Dr. Padilla refused to complete the CIGNA Physical Abilities Assessment Form stating that it was not his job to complete disability paperwork. Based on this refusal and unlikelihood that I could get Dr. Padilla to cooperate with the needs of CIGNA in the future, I requested Dr. Stacey Lin to provide me with a referral to a different orthopedic surgeon. Dr. Lin referred me to Dr. James Helgager.

On February 9, 2006, Dr. Helgager examined me and agreed to assist me with completing the CIGNA Physical Abilities Assessment Form as well as any other paperwork needed to provide to CIGNA regarding my disability claim. Dr. Helgager prescribed me Celebrex but I was later advised by my pharmacist not to take the medication due to my aspirin allergies. Dr. Helgager prescribed me a Functional Capacity Evaluation to objectively determine my capacity to work at my own occupation as well as at any occupation. Dr. Helgager prescribed me a hip injection under x-ray control. Dr. Helgager recommended that I postpone hip replacement surgery for as long as possible due to my young age. Dr. Helgager recommended that I not return to work due to my hip illness. He acknowledged that hip resurfacing might be a good idea in the future but, due to its failures in the past trials, that he would suggest waiting quite a while until the results of such a procedure are well documented from the latest clinical trials.

On March 30, 2006 I was evaluated by Richard Charlton, an occupational therapist, and David Manger, a physical therapist. I performed all of the activities that I was capable of performing and complied with all his instructions. Richard Charlton concluded that I do not appear capable of resuming my role in the workforce.

On April 6, 2006, I received a hip injection under the control of x-ray, at Tri-City Hospital in Oceanside, California. The procedure was painful and there was no noticeable reduction in the pain, either within the first several days or weeks afterwards, that I experience when performing my typical daily activities.

On April 20, 2006, I returned to Dr. Helgager for follow-up to my Functional Capacity Evaluation and hip injection. Dr. Helgager again recommended that, based on the Functional Capacity Evaluation and the lack of relief from the hip injection, I not return to work due to my hip illness. Dr. Helgager recommended that I return for follow up in one year unless my condition changes. He suggested that it would be best if I could wait another 10 years before having a total hip replacement.

My disability is primarily noticeable to me in two ways. I have very limited range of motion in my left hip and I have pain in my hip and surrounding areas. I have difficulty moving my leg at my hip joint forward past a 45-degree angle. When the position of my leg approaches 45 degrees under my own control, my hip experiences a mechanical blockage that prevents me from moving it further. In my doctors' offices, my range of motion has been recorded as being from 45 degrees to 70 degrees when my leg is positioned by the doctor. As I attempt to move my leg under my own control past 45 degrees, I experience pain that increases proportionally with the force that I apply. I experience pain levels from mild pain to severe pain that immobilizes me. The activities that cause pain include:

1. attempting to move my left leg past 45 degrees from vertical
2. sitting in a position that requires me to attempt to bend my hip joint past approximately 40 degrees for greater than 5 minutes
3. exerting force with my left leg when it is close to the limit of its range of motion
4. standing unaided for periods greater than 15 minutes
5. walking unaided for distances greater than a few hundred yards

I compensate for my limited range of motion by limiting my activity that requires me to sit, stand, walk, bend, crouch, climb, balance, kneel, crawl, stoop, or reach such that my left hip is positioned at or near the limits of its range of motion.

I am unable to perform many activities of daily living. I have modified the method by which I accomplishes many activities due to my inability to move my hip past its limited range of motion. I have great difficulty in performing many activities without significant pain. These limitations include but are not limited the items below. I:

1. cannot sit upright.
2. cannot put a sock on my left foot using my hands.
3. cannot bend to put pants on my left leg.
4. cannot put on a shoe using my hands.
5. cannot tie my left shoe.

6. cannot touch my lower left leg and foot in the shower or bath tub and therefore cannot wash my lower left leg and foot.
7. cannot touch my lower left leg and foot after showering or bathing and therefore cannot dry my lower left leg and foot.
8. cannot raise myself from or lower myself to a seated position on a toilet without assistance.
9. cannot sit on the toilet in an upright position.
10. cannot use a toilet with clothes around my ankles.
11. cannot bend to pick up items from the floor.
12. cannot raise myself from or lower myself to a seated position on a chair without assistance.
13. cannot sit upright in a chair.
14. cannot sit upright in an automobile.
15. am unable to sit on a floor without a device to support my torso at 45 degrees or less from the floor.
16. cannot operate the clutch pedal on a manual-transmission-equipped vehicle and therefore is unable to drive this type of vehicle.
17. cannot walk distances of more than a few hundred yards without significant pain.
18. cannot walk at a fast pace without significant pain.
19. cannot run.
20. cannot crouch.
21. cannot take non-steroidal anti-inflammatory drugs (NSAIDs).
22. must use prescribed narcotic pain medication to relieve long-lasting significant pain.
23. cannot operate a vehicle while taking my prescribed pain medication.

I manage my pain primarily in three ways: 1) avoiding activity that causes pain 2) modifying activities that cause pain and, 3) pain medication.

1. I employ the following avoidance techniques. I:
   a. do not wear shoes that require tying while on my feet.
   b. do not sit on a floor.
   c. do not walk far distances without pain medication.
   d. do not stand for long periods without assistance or pain medication.
   e. do not run.
   f. do not drive for long periods.
   g. do not ride for long periods without pain medication and/or ability to significantly recline the seat for the duration of travel.
   h. do not travel in an airplane without either being medicated for pain or sitting in a first class airplane seat that fully reclines.

2. I employ the following modification techniques. I:
   a. wash and dries my left leg using my right foot.

b. trap my left foot into the crevice of a large armchair and clip my toenails with one hand. This is very painful and often results in injury to the skin around my toenails.
c. intermittently clip my toenails of my left foot over several hours thus avoiding having my leg in a painful position for very long.
d. put on my left sock with my left leg behind me and to my side using one hand.
e. loosely tie my left shoe prior to putting it on my foot, places it on the floor, and jamb my left foot in.
f. step into pants while they are on the floor and lift them using my right foot.
g. use disabled height toilets and assistance devices to use a toilet.
h. must spread my feet a significant distance apart when using a toilet such that I can deflect my left leg downward. Therefore, I must remove my shoe, pants, and underwear from my left leg in order to move to a seated position on a toilet.
i. use pull handles and armrests to lift my body into and out of automobiles.
j. use the toes of my right foot to retrieve items from the floor.
k. displace my left leg to bend over to pick items from the floor.
l. hyper-extend my left knee joint when leaning over.
m. use chair backs and tables to assist myself in entering and exiting a seated position.
n. sit on the left edge of seats such that my left leg can extend towards downward rather than horizontal.
o. use stair handrails to assist in ascending and descending stairs.
p. step in a sideways manner when ascending or descending stairs to clear the outermost portion of the stair treads.
q. drive a modified vehicle with a removed "dead" foot pedal to provide the necessary room for placement of my left foot while driving.
r. often limps when I walk.
s. change my activities every few minutes to change the position of my hip joint.
t. roll onto my side in order to get my left leg out of a vehicle.
u. turn a chair approximately 45 degrees from its normal position so that my left leg can deflect downward off the sitting surface and I must slouch severely while sitting in a chair.
v. sit in a much-reclined position when driving an automobile.

3. I take narcotic pain medication (hydrocodone):
   a. in preparation for significant amounts of activity that causes pain.
   b. after significant amounts of activity that causes pain.
   c. when I am unable to modify my activities to reduce pain.
   d. and experience moderate intoxication and I usually fall asleep within one to two hours.

I am allergic to aspirin. When I take aspirin, I often break out with hives all over my body. This debilitates me for from several hours up to a day and has become increasingly worse with subsequent outbreaks. This limits me from taking non-steroidal anti-inflammatory drugs (NSAIDS).

I take Hydrocodone for pain relief as prescribed by my doctors. My prescription dosage is to take one to two tablets every four hours as needed for pain. I take one at a time and generally do not take another in the same day. I have on rare occasion taken more than one in a day. I have been advised by my doctors and my pharmacist not to operate a motor vehicle or hazardous equipment while taking Hydrocodone due to impairment of my cognitive ability. When I take my prescribed Hydrocodone, I become mildly intoxicated comparable to drinking two to three 12-ounce beers. I typically fall asleep within a few hours of taking the hydrocodone.

I have been prescribed the pain relievers Clebrex and Naprosyn. In both instances, prior to filling the prescriptions, I have been advised not to take them by my pharmacist, and subsequently by the prescribing physician, due to my aspirin allergy.

In approximately 1984, I tore the ligaments of my right knee and had surgery to repair them. In approximately 1988, I tore the ligaments in my right knee again in a skiing accident. I have not had surgery on my right knee again. This injury does not cause me discomfort or inhibit my functionality.

Employment Information:

I was last employed by Morpho Technologies in Irvine, California as Vice President, Business Development. My salary upon leaving Morpho Technologies was approximately $151,416 per year. In addition to this I typically received an annual bonus of 10 percent to 25 percent of my salary.

As Morpho Technologies' Vice President, Business Development, my job duties included all of the sales and marketing tasks of the company in addition to corporate management activities. I was often the sole representative from Morpho Technologies at meetings with executives from companies such as Motorola, Samsung, Nokia, Qualcomm, Hyundai, Sony, Panasonic, Ericsson, Texas Instruments, General Electric, and many others. Specifically these duties included:

1. Sales and Marketing activities both foreign and domestic. My activities included attending meetings with customers at their facilities and off-site venues such as restaurants, attending trade shows at various locations, attending internal strategy meetings and developing strategic plans. I traveled extensively in the United States and to other countries including Finland, Sweden, France, Germany, Korea, and Japan.
2. Corporate management duties. I worked in both the company's corporate offices and at venture capitalist's facilities. My activities included attending financing meetings, internal strategy meetings, and developing strategic plans. I traveled

regularly to attend meetings with venture capitalist companies. This activity was largely in the United States.

My duties at Morpho Technologies required me to be present in the corporate offices, travel to and from customer facilities and trade shows, and attend meetings with customers. The duties required me to be in a seated position in an office chair, an airplane seat, or other transportation seat for the overwhelming majority of each hour worked. Morpho Technologies travel policy required that I only purchase coach class airfare. Sitting in coach class significantly limited my ability to position my left hip in a way that I could lessen my hip pain. I was unable to sufficiently recline, especially when seatbacks where not permitted to be reclined.

My responsibilities required that I often work 50 or more hours per week plus travel time. I traveled to customer and/or business partner offices throughout the United States, Europe, and Asia one to two weeks per month.

It was imperative that I not have my cognitive abilities impaired during my work. My occupation relied upon my ability to represent Morpho Technologies in discussions regarding highly technical products and services relating to digital signal processors and their use in electronic devices such as wireless base stations, cable TV set top boxes, cellular telephones, and digital imaging equipment. This precluded my use of prescribed pain medication while working due to its cognitive-limiting affects.

I was terminated from my position due to my inability to perform the material duties of my position.

I was and have continuously to this date been unable to perform the duties of my former position as Vice President, Business Development at Morpho Technologies. These include:

1. Performing tasks while seated. My position required that I spend most of my time sitting:
    a. Working at a desk - I could not sit in an office chair in a position that did not cause pain. As a result, I had to curve my spine and slump in my chair. This caused pain both in my hip and in my lower back. I was only able to perform work in this position on a computer and only if the keyboard was mounted in a keyboard tray that would extend over my slumping body. I could not stay in this position for more that approximately 15 minutes at a time before the pain in my hip and back caused me to have to stop what I was working on. I could not sit a desk and use the work area of the desk unless I could sit sideways all the way onto the front edge of the chair and drape my left leg so that my hip remained at less that a 45-degree angle from my torso. I could not stay in this position for more that approximately 15 minutes at a time before the pain in my hip and back caused me to have to stop what I was working on. As a result, I would have to get up from my

sitting position every few minutes and flex my hip joint to relieve my pain. This prohibited me from performing any of my duties.

b. Attending meetings – sitting in a meeting was much like trying to sit at a desk except I was not able to get up to relieve the pain in my hip. Getting up was an inappropriate action during the proceedings of a business meeting especially for an executive as the sole representative for Morpho Technologies. Additionally, slouching in a way that relieved my pain positioned me in a way that was very inappropriate – both physically and culturally – for conducting business. Slouching and getting up during meetings were both particularly unacceptable in business meetings in foreign countries where cultural mistakes or an oddity jeopardizes business dealings. This prohibited me from performing any of my duties.

c. Dining with customers while maintaining an appropriate appearance – My duties at Morpho Technologies required frequent trips to Asia where it is customary to dine at tables designed for sitting on the floor. I was unable to sit on a floor with colleagues and customers due to the limited range of motion in my left hip. I could at best can maintain a semi reclined position using both hands to support myself and was unable to use my hands for dining. This prohibited me from performing my duties.

2. Traveling
   a. My position at Morpho Technologies required significant travel (25% to 50%). This travel was usually done alone but sometimes one or two business colleagues joined me.
      i. Traveling on airplanes – My limited range of motion made it difficult for me to sit in a coach class airplane seat for more than a few minutes without significant pain.. To relieve the pain I had to attempt to reposition myself every few minutes. This was impossible to accomplish during takeoff and landings since seatbacks had to be in an upright position. In addition, I had to have my seatbelt fastened and was not allowed to be out of my seat much of the time while in the air. Getting out of my seat was severely restricted due to Transportation Security Administration, Federal Aviation Administration, and individual airline restrictions after the terrorist attacks of September 11, 2001. A first class seat would provide much greater room and comfort to manage my pain through position change but I was not permitted to purchase first class seating for my travel due to Morpho Technologies travel policies.

      ii. Traveling in automobiles – On many of my business trips I was required to rent a car to travel from an airport to business meetings. I was unable to sit in cars that do not have significant legroom for the driver or passenger. Most cars available through rental companies have a dead pedal for the driver to rest my left foot upon while driving. Cars with dead pedals where often impossible for me to drive for more than approximately 15 to 20 minutes without causing significant pain in my hip. These dead pedals prevent me from moving my leg into a position that would minimize the pain in my hip. As a passenger, I had to move the front seat back all the way and significantly recline the seat to relieve the pressure on my hip joint. Although my prescribed pain medication significantly reduces my pain, I had been warned by my doctor and pharmacist not to drive while taking my pain medication. The combination of no pain medication and having to drive a car that was not modified to fit my needs for legroom made it impossible to drive most rental cars for more than a few miles. Morpho Technologies travel policies did not allow me to hire a driver.

3. Performing tasks while standing and/or walking. My duties at Morpho Technologies required me to at times stand and walk for long periods.
    a. Standing – The osteoarthritis in my left hip causes significant pain when I stand for long periods. I was required to stand for long periods at tradeshows were I represented Morpho Technologies. Changing positions often helped but did not fully relieve my pain. My prescribed hyrocodone pain medication helped relieve the pain but its intoxicating affects on me made it difficult to talk with the mental capacity required to conduct business. I most often conducted business with clients who had education levels of a PhD in a technical field such as engineering or computer science.
    b. Walking – The osteoarthritis in my left hip causes significant pain when I walk for distances of greater than approximately ¼ mile. Significant walking mostly occurred when I traveled due to far distances traversed in airports when walking to board airplanes, switching airplanes and picking up/dropping off luggage and rental cars, traversing customer campuses to attend meeting at their facilities, and walking throughout trade shows both as an exhibitor and as an attendee. My prescribed hyrocodone pain medication helped relieve the pain but its intoxicating affects on me made it difficult to talk with the mental capacity required to conduct business. I most often conducted business with clients who had education levels of a Masters or PhD in a technical field such as engineering or computer science.

Performing personal activities of daily living while working

Using a toilet in many facilities in foreign countries – I unable to conduct business in a customer's environment

Performing mentally challenging tasks

I am unable to maintain cognitive ability when managing pain with prescribed pain medication

My former job activities as described by me:

My former position was Vice President, Business Development. This position was the primary sales, marketing, and business relationship position within the company that I worked for. The position required attending a large number of meetings at both customer locations and within the company's own offices. This position and my career involve significant amounts of sitting including:

1. Attending meetings that can last for several hours with limited breaks and limited opportunity to reposition myself adequately to avoid pain.
2. Being confined to a seat aboard airplanes for periods ranging from 90 minutes to in excess of 12 hours with very restricted movement.
3. Being confined to a seat aboard public transportation (e.g. buses, passenger vans, trains) for periods ranging from 30 minutes to in excess of three hours with restricted movement.
4. Being confined to a seat while driving a vehicle for periods ranging from 30 minutes to two hours.
5. Combinations of any or all of the above.

In addition to significant time sitting in confined spaces as detailed above, my position also required a significant amount of other activity as described below:

- Carry demonstration equipment, marketing materials, and computer equipment during visits to customer sites for presentation in meetings.
- Walking distances in excess of several hundred yards to and from hotels to train stations, train stations to customer security gates, from security gates to customer offices while carrying the items listed above
- Reverse course and carry the above items to my next meeting or back to my hotel after sitting in meetings with customers

This position requires that I travel at a rate of 25% to 50% of the time. Typical international destinations included: Japan, Korea, Finland, France, Germany, and Sweden. Domestic destinations included all parts of the continental United States.

I have not been employed since leaving my position at Morpho Technologies. I have attempted to generate income as a financial planner. I have not generated any revenue as a financial planner. I have not been able to generate any revenue as a financial planner due to the osteoarthritis in my left hip.

I am not now nor have I ever been involved with any program providing athletic programs for home schooled children.

During the month of October 2005 and part of November 2005, construction was being performed by a contractor and his crew on my residence to remedy a ground-water intrusion problem. This required removing approximately 170 cubic yards of dirt from beneath my residence and replacing it with a concrete footing, water drainage system, and a concrete, steel, and block retaining wall. The removal of the dirt exposed my residence to the possibility of collapse if subjected to rain or earth movement from a source such as even a very mild earthquake. This created a situation where progress on the project had to continue at a rapid, unhampered pace in order to minimize the risk of danger and perhaps death to me and my family and destruction of my home. Because of the threat of danger and loss to me and my family I closely monitored the progress of the construction and at times provided assistance and materials and discussed with the contractor and his crew about the progress of the work to ensure that task was expedited.

On Tuesday October 25, 2005
I drove in my vehicle approximately 3.56 miles to the Home Depot store located at 3838 W Vista Way, Oceanside, CA 92056 to purchase some drywall for the construction project being performed on my residence. The journey lasted approximately 5 minutes to the store and 5 minutes to return to my residence. I purchased a sheet of drywall that had been cut into three pieces and some screws. I loaded the pieces of drywall and screws into my vehicle and returned home. I unloaded the drywall from my vehicle and carried it on my head into my garage. At no time did I bend my hip past its documented range of motion of approximately 45 degrees. Bending to place the drywall into my vehicle caused a temporary sharp pain in my left hip that ended soon after the task was complete. Removing the drywall from my vehicle did not cause pain since I did not have to bend over to remove it. Carrying the drywall into my garage caused pain in my left hip. After this, I rested in my recliner within my residence for about an hour and a half until the pain completely subsided.

Later in the day of on October 25, 2005 at approximately 11am, I drove approximately 1.4 miles to the neighborhood Blockbuster video store. The journey took approximately 3 minutes. I walked approximately 20 feet each way to put a DVD into the return slot. I walked with a limp due to the pain and limited range of motion in my left hip. I then left the Blockbuster parking area and drove approximately 0.3 miles to the neighborhood hardware store. The journey took approximately 2 minutes. I walked approximately 50 feet each way to purchase a piece of hardware for the construction being performed on my residence by the contractor. I walked with a limp due to the pain and limited range of motion in my left hip. I then left the hardware store parking area and drove approximately 1.2 miles to my residence. The journey took approximately 3 minutes. I remained at home for the rest of the day and evening where I managed my pain by restricting my activities and movements.

On Wednesday October 26, 2005
at approximately 9am I carried a standard sized backpack style book bag to my vehicle. I walked with a limp due to the pain and limited motion in my left hip. Later at approximately 9:40am, I drove approximately 1.6 miles to the legal offices at 2755 Jefferson Street. The journey took approximately 3 minutes. I carried the book bag inside walking with a limp due to the pain and limited range of motion in my left hip. Inside the offices, I attended a meeting with an advisor. During this meeting, I was able to slouch at will, get up and walk around, and otherwise conduct myself in a manner that allowed me

TN_2APP0204

to manage my hip pain such that I could endure the meeting. At approximately 11:30, I drove approximately 1.6 miles back to my residence. The journey took approximately 3 minutes. I then relaxed in my recliner for approximately 20 minutes. At approximately 11:50am, I drove approximately 2.1 miles to 2001 South El Camino Real, Oceanside, Ca to pick up my son from preschool. The journey took approximately 4 minutes. I walked approximately 200 feet roundtrip with a limp due to the pain and limited range of motion in my left hip to retrieve my son from his classroom. I then returned in my vehicle to my residence. The return journey took approximately 4 minutes.

Later in the day of on October 26, 2005 at approximately 12:30pm, I drove approximately 1.2 miles to the neighborhood hardware store. The journey took approximately 3 minutes. I walked approximately 50 feet each way to purchase a piece of hardware for the construction being performed on my residence by the contractor. I walked with a limp due to the pain and limited range of motion in my left hip. I then left the hardware store parking area and drove approximately 1.2 miles to my residence. The journey took approximately 3 minutes.

During the rest of the day on October 26, 2005, I performed various menial tasks around my residence to make certain that the construction being performed by the contractor stayed on track. On this day the contractor was pouring concrete for the project. This required that many things be check for accuracy. This activity was performed while taking periods of rest in a recliner in a room adjacent to my garage. During periods of speaking with the members of the construction crew, I often leaned against the wall on my left side to take the weight off my left hip. At various times, I walked around my residence with a limp due to limited range of motion and pain in my left hip. At various times I attempted to bend over to pick up items from different heights below my waist. While doing so I raised my left leg behind me or significantly hyper-extended my left knee joint to compensate for the lack of range of motion and pain in my left hip.

At approximately 1:45pm on October 26, 2005, I nearly fell to the ground due to the inability to move my left hip adequately. As a result, I experienced sharp pain in my hip joint. At approximately 2pm, I took a single prescribed hydrocodone pain pill as a result of this near fall and the necessity to be at hand the rest of the afternoon due to the delivery of concrete for the construction project being performed by the contractor.

At approximately 3:30pm on October 26, 2005, I went inside and feel asleep in my recliner. This was due to the drowsy affects of my pain medication. I awoke after approximately one hour and spent the rest of the day and evening relaxing around my home.

On Thursday, October 27, 2005
at approximately 7:30am, I went outside to remove scraps of wood from fence posts that were set in concrete by the contractor that was working at my residence.
I attempted to bend over as best as I could to remove the pieces of wood but I had put all of my weight on my right leg and extended my left leg backwards so that I could reach towards the ground. This placed me in a precarious position and nearly caused me to fall

to the ground. Approximately 20 minutes later, I carried some thin strips of wood to the opposite side of my residence for storage. I attempted to bend over as best as I could to pick up a drill from the ground but I had put all of my weight on my right leg and extended my left leg backwards so that I could reach towards the ground. I nearly fell while doing this. I returned inside my residence where I sat in my recliner for approximately the next 30 minutes watching the news.

During the rest of the early morning on October 27, 2005, I performed various menial tasks around my residence to make certain that the construction being performed by the contractor stayed on track. While talking with one of the workers I stood solely on my right leg while holding on to the building. This was due to the pain in my left hip. My activity was performed while taking periods of rest in a recliner in a room adjacent to my garage. At various times, I walked around my residence with a limp due to limited range of motion and pain in my left hip. At various times I attempted to bend over to pick up items from different heights below my waist. While doing so I raised my left leg behind me or significantly hyper-extended my left knee joint to compensate for the lack of range of motion and pain in my left hip.

On Thursday, October 27, 2005 at approximately 10:00 am, I drove approximately 1.8 miles to Witch Creek Winery at 2906 Carlsbad Blvd, Carlsbad, CA 92008. The journey took me approximately 6 minutes. I attended a wine making event as the guest of the winery owner, Mr. David Wodehouse. I was there to observe the wine making process and participate to the extent that I felt comfortable. On and off during the few hours that I was at the winery I assisted along with other friends of Mr. Wodehouse. Much of the time was spent sampling the winery's wine. Due to my disability, my contributions were mostly limited to using a garden hose and moving some plastic juice bins. Much of the time, I simply observed the rest of the people as they did a variety of tasks around the winery. While observing I sampled wine, drank coffee and rested by leaning against and sitting on the edge of a platform that allowed me to take the weight off my hip without placing it into an uncomfortable position. At various times I attempted to bend over to pick up items from different heights below my waist. While doing so I raised my left leg behind me or significantly hyper-extended my left knee joint to compensate for the lack of range of motion and pain in my left hip. I stayed at the winery for approximately two and a half hours before returning home to rest and eat lunch. During the morning time spent at the winery, I contributed to the wine process for approximately 35 minutes total within the two and a half hours. I drove approximately 1.8 miles to my residence. The journey took me approximately 6 minutes.

After lunch on Thursday, October 27, 2005 at approximately 1:15 pm, I drove approximately 1.8 miles back to Witch Creek Winery. The journey took me approximately 6 minutes. I stayed until approximately 2:25 pm. During the after lunch time spent at the winery, I contributed to the wine process for approximately 20 minutes total within the one hour and 10 minutes. I drove approximately 1.8 miles to my residence. The journey took me approximately 6 minutes. My total contribution of time at the winery on Thursday, October 27, 2005 was approximately 55 minutes. The remainder of the time was spent talking with others, resting on a platform, and observing the activities of others.

Later in the afternoon and for the rest of the evening on Thursday, October 27, 2005, I spent my time at my residence where I reduce the pain in my hip by resting in an inclined position.

On Friday, October 28, 2005
throughout the morning, I remained in my residence where I rested most of the time in an inclined position. My hip remained sore from the increased activity of the prior day.

In the afternoon on Friday, October 28, 2005, I assisted the construction crew that was working on my residence in an attempt to keep them on schedule. This involved emptying a vacuum canister containing a small amount of dirt two times and providing them with some of my tools. I did not fill a bucket with rock nor did I haul rock in a bucket in a wheelbarrow. My assistance to the crew lasted a total of approximately 10 minutes throughout the day. I also spoke to the construction crew from time to time regarding the progress on the project. The remainder of the day I spent relaxing inside my residence where I rested most of the time in an inclined position.

On Saturday, October 29, 2005
I accompanied my family to the San Diego Zoo. I took a dose of my prescribed pain medication in anticipation of the pain that I would experience from walking around the zoo. Because of taking my pain medication, I had to let my wife drive the family both to and from the zoo. While a passenger in the vehicle, I rode in a much-reclined position to minimize the pain in my left hip. While at the zoo, I used my children's strollers to aid me in walking. At no time did I run. I took frequent rests to minimize the pain in my left hip. While at the park, at approximately 11:45am, I took a second dose of my prescribed pain medication due to the pain in my left hip. After concluding our family's visit to the zoo, I had to let my wife drive due to the intoxicating effects of my pain medication. While a passenger in the vehicle, I rode in a much-reclined position. Due to the drowsy effects of my pain medication I slept much of the way home.

After arriving home from the zoo on Saturday, October 29, 2005, I slept again due to the drowsy effects of my pain medication. I spent the rest of the afternoon relaxing mostly in a reclined position to alleviate the pain in my left hip.

In late September, 2005 I began a weight loss program with the goal of bettering my health. On September 24, 2005, I began keeping a journal with entries that included my recorded weight. In addition to recording my weight, I recorded my consumption of my prescribed pain medication and pertinent activities in my life. This record shows the dates and amount of my pain medication consumption.

That Declarant is competent under the law to give this affidavit and unless stated has personal knowledge of the facts stated herein.

______________________ 5/15/2006

Signature of Declarant DATE

Sworn and subscribed before me this 15 day of May, 2006 (year and month).

My commission expires: 3-15-08

____

Notary Public [SEAL]

OFFICIAL SEAL
LORELEI A. MITCHELL
NOTARY PUBLIC-CALIFORNIA
COMM. NO. 1471040
SAN DIEGO COUNTY
MY COMM. EXP. MAR 15, 2008

EXHIBIT C

EXHIBIT C

MATRIX
REHABILITATION

PACIFIC BEACH PHYSICAL THERAPY
3737 Moraga Ave., Ste. B-117
San Diego, Ca 92117
(858) 270-0981

Client:	Todd Nash	SS#:	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
Employer:	Unemployed	Date of Injury:	1997
Occupation:	Private Sector Executive; VP, Business Development	Carrier:	Medicare
		Claim Number:	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-A
Physician:	James Helgager, M.D.	Date/Eval:	3/30/06
Diagnosis:	Severe osteoarthritis, left hip		

FUNCTIONAL CAPACITY EVALUATION REPORT

Personal Demographics and Background Information

Vital Statistics				
Sex	**Date of Birth**	**Age**	**Handedness**	**Height**
Male	11/25/63	42	Right	68"
Weight	**Resting HR**	**Max Pred. HR**	**Target HR**	
190#	80	178	124-151	

Purpose of Referral - Evaluation of work capacity relative to usual and customary employment in the above named occupation, as well as to determine present work capacity for part-time gainful employment in his field of specialty.

Symptom Reports – For additional specifics regarding subjective pain and perceived functional disability, please refer to the section of the FCE Supporting Data Report entitled "Performance Inhibition Screening".

Arrival symptoms were described as "stabbing" in the anterior aspect of the left hip, with intensity rated at 3/10 (moderate).

The intensity level reported above is *reportedly typical for this evaluee at this time of day.* Over the last 30 days, this evaluee reported a range in pain from 2/10 (weak pain) to 10/10 (very, very strong pain). This evaluee attributes increased pain levels to stumbling when walking, as a result of unexpectedly catching his left foot on obstacles. Increased left hip pain also occurs as a result of stair climbing (resides in a two story home).

When particularly symptomatic, this evaluee reportedly attains relief by changing activities as needed or by reclining to eliminate pressure on the left hip.

During the FCE, symptoms were described as increased low back pain secondary to sitting in a reclined posture in an adjustable chair. He also noted increased left hip pain due to sitting, standing, bending, kneeling, twisting, lifting, carrying and pushing/pulling tasks.

Upon departure, symptoms were described as follows: "Stabbing" in the left anterior hip, rated at 5.5/10 intensity.

Observed Pain Behaviors –The following pain behaviors were noted: Frequent squirming while seated, alternating of sitting and standing postures, verbalization of increased pain, and self-limited performance due to increased pain and restricted ROM in the left hip.

Response to Testing - This evaluee was contacted via phone at 10:20 AM on the day following the FCE. This worker reported that he needed to go home and recline after the FCE. Per Mr. Nash this was a typical response. He stated that after exerting himself to a significant degree, he generally needs to recuperate for an equal amount of time in order to ensure adequate recovery. At the time of the call, he was reportedly "a little sore" and rated his discomfort at >3/10.

Subjective History – Date Last Worked at Usual and Customary Job: 9/26/03. This evaluee discontinued working as he was no longer able to tolerate prolonged sitting in meetings and long flights secondary to left hip pain. Ability to tolerate prolonged sitting was a requirement of his usual and customary position and was expected of him. Mr. Nash went out on FMLA, then state disability. Shortly thereafter, he was terminated. Mr. Nash is now on Social Security Disability.

Present Status: Disabled and unable to work, per Dr. Helgager.

Mechanism of Injury: Gradual onset of left hip pain, starting in 1997.

Surgeries / Dates: Right knee ACL reconstruction ~20 years ago. He reportedly re-ruptured the ACL ~3 years after surgery. He has not undergone a second surgery. According to the evaluee, his present status is satisfactory.

Outcome Post Surgery: Improved (right knee). He is definitely a surgical candidate for left hip replacement, but has been advised to wait as long as possible, due to his young age, before having the procedure done. This is what he plans to do.

Prior Treatment: No physical therapy. Uses pain medication and self-limits activity as needed.

Continuing Treatment? N/A. See "Prior Treatment" above.

Present Medications: Allergic to Aspirin. Mr. Nash uses Vicodin as needed (helps with sleep). He tries to avoid use as much as possible.

Adapted Equipment In Use: None, other than handicapped toilets at home.

PMH: Noteworthy for two previous right knee injuries.

Client Work-related Goals: Would like to return to work (date not specified) after hip replacement.

Perceived Ability to RTW: Presently he is unable. The worker explained that sitting is the primary issue (in office, planes, with customers, etc.).

Reported Functional Tolerances – Overall, this client reportedly has attained ~30% of pre-injury capacity. He has learned to modify many tasks. Perceived functional capabilities and deficits were addressed in the following two tables for work-related function (U.S. Dept. of Labor factors) as well as for basic activities of daily living (ADL).

U.S. Department of Labor Physical Factors		
Factor	**Ability**	**Evaluee's Comments**
Sitting	Restricted	Limited by left hip pain. Needs to frequently change positions. Cannot tolerate upright sitting. Must extend left hip. Estimated tolerance of 15 minutes maximum in good chair, then ~10 minutes recurrently. He must recline, and then notes increased low back pain.
Standing	Restricted	Stationary standing maximum is 15 minutes, and then he must sit. The evaluee leans a lot and bears weight mostly on the right when in pain.
Walking	Restricted	Flat surfaces are preferred (maximum is a couple of hundred yards), limited by left hip pain. Inclines are a problem due to shorter step with left leg. Declines tend to jam the left hip joint.
Climbing	Restricted	See "walking" above. Stairs are handled with side-step to avoid catching toes on steps. Must use rail. Lives in 2-story home. Ladders are climbed with a non-reciprocal step with the right leg (left follows).
Stooping	Restricted	Able to use golfer's lift or bend forward if he hyperextends the left hip only. He cannot stand erect or bend forward secondary to left hip pain and decreased ROM (mechanical decrease in ROM due to deformity of left hip femoral head).
Kneeling	Restricted	Able to bear weight on the left knee only (upright posture) but only if able to use external support from a stable object for support movement up/down.
Squatting	Restricted	Unable to do at all secondary to left hip pain and decreased left hip ROM.
Twisting	Restricted	AROM is better with twist to the right side.
Neck Motion	Unrestricted	All planes okay.
Manipulation / Pinch	Unrestricted	
Grasp	Unrestricted	

U.S. Department of Labor Physical Factors		
Factor	**Ability**	**Evaluee's Comments**
Overhead Reaching	Unrestricted	
Forward Reaching	Unrestricted	
Unilateral Pushing	Restricted	Holds onto objects with contralateral limb if standing, secondary to balance issues.
Unilateral Pulling	Restricted	As above.
Whole Body Pushing	Restricted	Right LE power would be required. Intermittent is okay with increased left hip pain.
Whole Body Pulling	Restricted	As above.
Unilateral Lifting	Restricted	Left arm only in lift from floor - golfer's lift only. Knuckle to shoulder lifts are manageable. Shoulder to overhead is not a problem.
Bilateral Lifting	Restricted	Unable from floor secondary to right hip. Estimated 30-40# in knuckle to shoulder ROM. Shoulder to overhead with ~50#.
Unilateral Carrying	Restricted	Right handed only with ~30# with onset of left hip pain. Avoids on left secondary to left hip.
Bilateral Carrying	Restricted	More difficult than right unilateral carry. Can manage 10-20# okay. Heavy loads increase left hip and low back pain, particularly with trunk deviation away from perfectly erect posture.

Activities of Daily Living		
Activity	**Ability**	**Evaluee's Comments**
Self Care/ Grooming	Restricted	Has modified bathrooms. Cannot bend to deal with shoes. Has adapted techniques for donning shoes, socks, pants and trimming nails.
Meal Preparation	Unrestricted	Stands most of the time.
Child Care	Restricted	Able to occasionally lift children. Cannot get on floor with small kids.
Housekeeping	Restricted	Helps with light tasks. Able to vacuum with rests.
Shopping	Unrestricted	Pushes cart. Helps with support.
Yard Work	Restricted	Can mow 10 x 40 backyard. Weeding is very difficult.
Tool Use	Restricted	Small tool use is okay, especially if standing. Other postures are challenging.
Driving	Restricted	Modified vehicle. Drives SUV easier to get in/out. Uses handles to get in. He reclines seats as best he can while driving. Wife drives when they are together in car (he then reclines fully).
Hobbies	Restricted	Enjoys playing with kids - has to verbally interact as opposed to physical interaction.

Comments: This evaluee reportedly spends an average day as follows: Reclines and watches television, reads, plays/interacts with kids.

Medical Restrictions – This worker was cleared to participate in the FCE without restriction.

Evaluation Outcome

Attendance and Punctuality – Early arrival was noted. Client participated for 4 hours and was unable to complete all tasks presented due to decreased AROM and pain in the left hip.

Range of Motion / Manual Muscle Testing – Testing was performed by a physical therapist. Results are included as an appendix to this report. Please refer to the "FCE Supporting Data Report" for Repetitive Motion findings.

Demonstrated Functional Status – Given that no specific vocational objectives or specific usual and customary job demands were identified, the table below summarizes basic physical performance as demonstrated during a "generic" Functional Capacity Evaluation.

Physical Demand	Job Requirement	Demonstrated Ability
Sitting	Non-specific	Maximum observed sitting was 30 minutes with recurrent periods of 15 minutes. All sitting was in a padded adjustable chair. Mr. Nash leaned backward and generally kept the left LE in extension. Frequent squirming and postural changes were noted. Left hip pain and low back pain (due to poor seated posture) are limitations. Sitting upright is very uncomfortable.
Standing	Non-specific	Maximum observed standing ranged from 10-15 minutes with one extended period of 50 minutes that included periods of leaning against stable objects.
Walking	Non-specific	Evaluee walks slowly with a limp. He declined the submaximal treadmill at the end of the evaluation secondary to subjective pain as a result of tasks completed up to that time.
Balance	Non-specific	Reported balance issues with MMH tasks (lift/carry) and with bending.
Stooping	Non-specific	Forward bend with hands to 15" above floor with complaint of increased left hip pain if slow and self-paced. Declined rapid test.
Kneeling	Non-specific	Able on left knee only, if able to push off for ascension. Also needs support to descend. Declined after 1 rep. Unable to kneel on right knee or on both simultaneously.
Squatting	Non-specific	Reportedly unable due to left hip pain and "mechanical block".
Twisting Waist	Non-specific	AROM is better to patient's right side, but still restricted. Marked restriction to patient's left due to let hip pain.
Climbing	Non-specific	Not evaluated. Reportedly must use non-reciprocal side step technique.
Overhead Reach	Non-specific	Unrestricted.
Forward Reach	Non-specific	Unrestricted to full arm's length. Evaluee complained of increased left hip pain if forward bend is required.
Power Grasp	Non-specific	Unrestricted. Right/left power grasp is average.

Physical Demand	Job Requirement	Demonstrated Ability
Simple Grasp	Non-specific	As above.
Pinch Grasp	Non-specific	Not formally evaluated. WFL per observation. No hand-related complaints.
Fine/Gross Dexterity	Non-specific	The evaluee reported no functional deficits with his hands or upper extremities. This area was not tested.
Push / Pull	Non-specific	Unable to tolerate force application through left LE. Lifted left LE to minimize weight bearing with whole body push/pull and right push, left pull. Left push and right pull were declined due to need for left LE power.
Lifting	Non-specific	Unable to lift from floor (cannot squat). Lifted 30# in knuckle to shoulder ROM with complaint of balance problems and increasing left hip pain. Balance issues also with 25# (20# appeared optimal). In shoulder to overhead ROM, lifted 25# with complaint of decreased balance. 20# appeared optimal.
Carrying	Non-specific	Unable to bilaterally carry secondary to problems with left hip pain with slight forward or backward spinal deviation from neutral. Left unilateral carrying is avoided due to left hip pain. Right carry (suitcase style) is limited to 20# x25' due to increasing left hip pain.

Comments: Please refer to "FCE Supporting Data Report" (Projected Eight-Hour Work Capacity) for additional specifics. This worker's aerobic capacity could not be formally evaluated as he declined participation in the submaximal treadmill procedure as a result of left hip pain at the end of the FCE.

Sustained Activity Tolerance/ Workplace Tolerance - This client was able to perform satisfactorily in a self-limiting manner without the need for symptom control breaks.

Max SAT was attained by alternating sitting and standing work postures ~every 15 minutes, unless able to stand and lean. Limitation to sustained activity is due to increased left hip pain and low back pain from sustained sitting in awkward postures and increased left hip pain from standing/walking.

This worker demonstrated inadequate workplace tolerance for resumption of usual and customary job duties (at required level of function) with prolonged sitting in meetings and air travel. Workplace tolerance issues were due to somatic complaints as a result of physical exertion, as well as sitting and standing.

Test Compliance

Consistency of Effort - Findings suggest that this worker applied consistent effort during the static grip and push/pull testing process. See "FCE Supporting Data Report".

Maximum Effort - Heart rate results during static push/pull testing suggest that maximum effort was shown with whole body pushing and satisfactory effort was demonstrated with whole body pulling. However, Borg Rated Perceived Exertion with Heart Rate Comparison measures suggest that submaximal effort was exerted and that perceived and demonstrated effort were significantly inconsistent (the former being greater than the latter)_. Please see "Isometric Push/Pull" for specifics on evaluee's technique during this task. Please note that evaluee's intent is not implied.

Heart rate during dynamic strength testing suggested that maximum effort was not demonstrated. This is consistent with self-limited performance due to "balance issues" relative to left hip weight bearing and increasing left hip pain due to severe osteoarthritis. Borg Rated Perceived Exertion with Heart Rate Comparison measures suggest that satisfactory effort was exerted during lift testing.

Tool, Job, Workstation Modification - This client must alternate sitting, standing, and leaning against stable objects approximately every 15 minutes in order to maintain the symptom control and productivity demonstrated during this evaluation.

This client required workstation modification in order to maintain the symptom control and productivity demonstrated during this evaluation. Modification consisted of allowing for changing of sitting and standing as needed. Also, the evaluee used a 44.5" high surface (standing elbow height is 43") to compete the questionnaires when too uncomfortable seated at a standard 30" high table.

Limitations

Based upon FCE results, this client has deficits with: workplace tolerance (when considering usual and customary employment), body mechanics (due to left hip), muscular strength and endurance, ROM, symptom control and loss of worker role identification, all of which contribute to diminished productivity below usual and customary occupation requirements. Even though strength demands may be negligible most of the time (unless at a trade show), demand for prolonged sitting and standing appear to be excessive in this gentleman's line of work.

Realistically, in terms of strength, this worker is currently functioning at the "light" physical demand level with push/pull and carrying activities. Lifting is significantly limited as his inability to squat prevents lifts from the floor with proper mechanics. Although able to lift (knuckle to shoulder and shoulder to overhead) in the "light-medium" range, balance due to left LE weight bearing is an issue. On this basis, he appears restricted to no lifts from the ground and no lifts > 20# in the previously noted ROM. He is unable to carry objects bilaterally or in the left UE unilaterally. Right carries should be limited to 15# over 50'. He should avoid squatting and kneeling and bend only on an occasional basis. Also, Mr. Nash needs to alternate sitting and standing as needed ~every 15 minutes.

Recommendations

This client does not appear capable of resuming his usual and customary role in the workforce at present. See "Limitations" above. The question here is how long this evaluee wishes to remain functionally impaired to the degree he is. He is not sure when he will opt for hip replacement, due to concern of the need for additional procedures as he ages.

Dr. Helgager, thank you for the opportunity to participate in this client's case. Please refer to the "FCE Supporting Data Report" for additional detail, if so desired. If you have questions, concerns, or need for further assistance, please don't hesitate to contact the undersigned at (714) 404-7794.

Respectfully Submitted,

Richard S. Carlton, MOT, OT/L, CVE
OT #30

FUNCTIONAL CAPACITY EVALUATION SUPPORTING DATA REPORT

Performance Inhibition Screening – Results of the following Pain Questionnaires and Perceived Disability Questionnaires are listed below. Please note that willful intent on the part of the evaluee is not implied.

Test	Score	Low	High
Numeric Analogue Scale (NAS)	3	0-2	6-10+
Visual Analogue Scale (VAS)	3cm	0-2	6-10
Million Visual Analogic Scale (MVAS)	92.3cm	0-44	90-150
Ransford Pain Drawing	0/25	0-3	>3
Waddell Subjective Symptom Battery	2	0-2	>5
Spinal Function Sort (SFS)	74 / 200	100	>180

Comments: Results of the NAS and VAS suggest that subjective pain moderately impacts function. Results of the MVAS suggest that subjective pain severely impacts function.

Findings of the Ransford Pain Diagram suggest that a preoccupation with somatic complaints does not appear to be an issue in terms of disrupting function.

The Waddell Subjective Symptom Battery suggests that subjective pain could mildly impact function.

Results of the Spinal Function Sort (SFS) suggest that this client has a highly disabled functional perspective that could be a significant obstacle in terms of work function. His rated perceived capacity score of 74 places him well below the "Sedentary" level of demand. On 18 of 50 items considered (36%) the evaluee reported ability to perform the task in an adapted manner that differed from the illustration. Of particular concern was lifting and lowering, climbing, and tasks requiring stooping, kneeling or squatting.

Demonstrated performance was inconsistent with the SFS profile as scored above, but consistent with general ability given his ability to adapt performance.

Overall, performance was consistent with that of a suitably motivated individual who has significantly limited ROM and strength in the left hip. He does as much as he can and has learned to adapt and appropriately self-limit.

Repetitive Motion Testing – The client demonstrated the following abilities during self-paced and rapid-repetitive testing. Normative values apply only to rapid, repetitive testing and are based upon completion time. The "REP" column lists the number of reps required, while the "ROM" column shows range of motion. The "Speed" column reflects speed of motion demonstrated (self-paced and rapid). The "Symptoms" column indicates whether the task elicited a symptomatic response (clarified in the "Comments" section below).

Task	REP	Frequency	Norm	ROM	Speed	Outcome	Symptoms
Hand Open/ Close	10	Self-paced	N/A	WFL	WFL	Able	No
Hand Open/ Close	10	Rapid	8"	WFL	4"	Able	No
Wrist Flex/Extend	10	Self-paced	N/A	WFL	WFL	Able	No
Wrist Flex/Extend	10	Rapid	8"	WFL	5"	Able	No
Elbow Flex/Extend	10	Self-paced	N/A	WFL	WFL	Able	No
Elbow Flex/Extend	10	Rapid	8"	WFL	6"	Able	No
Overhead Reach	10	Self-paced	N/A	WFL	WFL	Able	No
Overhead Reach	10	Rapid	7"	WFL	8"	Able	No
Forward Reach	10	Self-paced	N/A	WFL	WFL	Able	No
Forward Reach	10	Rapid	6"	WFL	6"	Able	No
Neck Flex/Extend	5	Self-paced	N/A	WFL	WFL	Able	No
Neck Lateral Flex	5	Self-paced	N/A	WFL	WFL	Able	No
Neck Rotation	5	Self-paced	N/A	WFL	WFL	Able	No
Fwd Back Bend	10	Self-paced	N/A	Restricted	WFL	Able	Yes
Fwd Back Bend	10	Rapid	15"	N/A	NA	Declined	N/A
¼ Twist (R, C, L)	5	Self-paced	N/A	Restricted	WFL	Unable	Yes
Squatting	5	Self-paced	N/A	N/A	N/A	Declined	N/A
Squatting	5	Rapid	8"	N/A	N/A	Declined	N/A
Alt ½ Kneeling	5	Self-paced	N/A	WFL	Restricted	Unable	Yes
Full Kneel	5	Self-paced	N/A	N/A	N/A	Declined	N/A

Comments: This evaluee reported problems as noted below. Forward back bending with hands to 15" above floor (just past knees). He complained of pain in the posterior aspect of the left hip ("sharp muscular pain" and "mechanical blockage"). The evaluee rated intensity at 6/10 (resolves when done). The evaluee declined the rapid test, anticipating that "the bounce would hurt" when EROM was reached and return to erect posture was necessary. ¼ twist is better on the right side (~50%). AROM to the left is markedly restricted with complaint of "cramping" in the musculature about the left hip. Unable to alternately ½ kneel and unable on bilateral knees. Performance was tentative on the left knee. He completed one rep without external support with complaint of increased left hip pain and limited ROM in the hip. Further repetitions were declined.

Static Strength Testing

JAMAR Five Span Isometric Grip - Maximum grip strength compared to age/gender specific norm per Mathiowetz, et. al.,1985. Each trial is 5 seconds in duration. The evaluee is instructed to exert maximal effort. He was seated while leaning back on the chair's lumbar support with his left LE in extension.

JAMAR 5 Span Test		Trials						Sample	Span 2
Hand	Span	1	2	3	Mean	SD	CV	Mean	Percentile
Right	1	91	95	95	93.7	1.886	2.0%	na	na
	2	115	117	106	112.7	4.784	4.2%	116.80	40th-50th
	3	105	94	99	99.3	4.497	4.5%	na	na
	4	95	87	80	87.3	6.128	7.0%	na	na
	5	81	81	79	80.3	0.943	1.2%	na	na
Left	1	93	90	87	90.0	2.449	2.7%	na	na

JAMAR 5 Span Test		Trials						Sample	Span 2
Hand	Span	1	2	3	Mean	SD	CV	Mean	Percentile
	2	115	110	107	110.7	3.300	3.0%	112.80	40th-50th
	3	99	87	88	91.3	5.437	6.0%	na	na
	4	87	92	91	90.0	2.160	2.4%	na	na
	5	84	85	81	83.3	1.700	2.0%	na	na

Comments: Bell curve profile is present on both hands. None of 10 CVs exceeded the 14% cut point for reliability. Results suggest acceptable consistency. Please note average bilateral grip strength. This evaluee reported no problems with this test.

Rapid Exchange Grip (REG) - This procedure is a reliability check for above JAMAR 5 span test. It is a brief maximum grip strength test (each squeeze/release trial lasts ~ 1 second). Again, evaluee's are instructed to exert maximal force. The REG mean performance value (span 2) should not equal or exceed the mean attained on the 5 span test above.

REG Test			Trials						
Hand	1	2	3	4	5	Mean	SD	CV	Result
Right	111	115	117	112	113	113.6	2.154	1.9%	Positive
Left	100	101	100	104	100	101.0	1.549	1.5%	Negative

Comments: Consistent trial-to-trial effort is demonstrated per CV <14%. Negative result suggests that maximum effort was shown on the 5 Span Test with the left hand. Positive result suggests that less than maximum effort was shown on the 5 Span Test with the right hand. This client reported no problems with this test (completed after the 5 Span Test).

Isometric Push/Pull - Waist height push/pull using Chatillon Gauge. Each trial is 5 seconds in duration. Again, maximum effort is requested. PDC is determined by dynamic conversion per Chafin, et al.

Isometric Push/Pull		Trials					Safe Max	PDC
CSD-300	1	2	3	Mean	SD	CV	Dynamic	Level
Whole Body Push								
Peak Force	38	36	35.5	36.5	1.080	3.0%	18.3	Light
Sustained	34	34	34	34.0	0.000	0.0%	17.0	Light
Whole Body Pull								
Peak Force	50.5	48.5	50.5	49.8	0.943	1.9%	24.9	Medium
Sustained	39.5	42	46.5	42.7	2.896	6.8%	21.3	Medium
Left Arm Pull								
Peak Force	35.5	33	43.5	37.3	4.478	12.0%	18.7	Light
Sustained	31.5	27.5	37.5	32.2	4.110	12.8%	16.1	Light
Right Arm Pull								
Peak Force	Declined			N/A	N/A	N/A	N/A	N/A
Sustained				N/A	N/A	N/A	N/A	N/A
Left Arm Push								
Peak Force	Declined			N/A	N/A	N/A	N/A	N/A

Isometric Push/Pull CSD-300	Trials 1	2	3	Mean	SD	CV	Safe Max Dynamic	PDC Level
Sustained				N/A	N/A	N/A	N/A	N/A
Right Arm Push								
Peak Force	41	36	39.5	38.8	2.095	5.4%	19.4	Light
Sustained	35.5	32	36.5	34.7	1.929	5.8%	17.3	Light

Comments: Results suggest acceptable consistency as 0 of 8 CVs exceeded the 14% cut point for reliability. This worker performed whole body pushing and whole body pulling tasks with slightly increased complaints of pain. These tasks were executed with the left LE in a non-weight bearing manner (foot slightly lifted from floor) to minimize the likelihood of increased pain, per evaluee.

Right unilateral pushing was performed without complaint when performed with left LE in same position as previously noted. Right LE power was emphasized on this task. Left unilateral pushing was declined, due to evaluee not wanting to utilize the left LE for power (anticipated increased pain).

Left unilateral pulling ws performed without complaint with the left LE in the same position as above. Right LE power was emphasized. Right unilateral pulling was declined for same reason noted above regarding left LE power.

Heart Rate Results / Expenditure of Effort (Owens, et. al., 1993) – The table below is based upon performance of whole body static strength tasks as performed above. Level of expended effort is measured by noting change in pretest and posttest heart rate (measured with Polar Monitor) and comparing to the sample from the above study.

Expenditure of Effort						
Task	Pre HR	Post HR	Change	Expected Increase	Min Acceptable	Reliable?
Whole Body Push	84.7	107	22.3	20.4	11.7	Yes
Whole Body Pull	85	99.3	14.3	19.3	11.7	Yes

Comments: Findings suggest that maximum effort was shown with pushing and acceptable effort was expended with pulling. See specific test above for response to task.

Borg RPE and Heart Rate Comparison (ACSM, 2000) – The Borg 6-20 RPE Scale was used to monitor expenditure of effort with the static strength tests listed below. This procedure is particularly useful when the evaluee is using beta blockers for control of blood pressure (expected heartrate response to exercise is affected). The difference between the evaluee's RPE x10 is compared to the actual heart rate measurement (Polar Monitor) immediately following the task.

Studies suggest that differences of 20 to 50 units may usually be explained by physiological reasons and are considered WFL. However, differences of 50 units or more suggest significant inconsistency between perceived and actual effort and are often indicative of submaximal effort and possible symptom exaggeration.

Isometric Task	RPE x 10	HR	Difference	Degree of Effort
Whole Body Push	160	107	53	Submaximal
Whole Body Pull	150	99	51	Submaximal
Right Unilateral Push	160	102	58	Submaximal
Left Unilateral Pull	160	104	56	Submaximal

Comments: Findings suggest that submaximal effort was demonstrated. This is consistent with evaluee's technique of lifting the left LE into a non-weight bearing stance during application of force. The evaluee tried to perform to tolerance to avoid a flare-up. Results also show that perceived effort and actual effort were inconsistent, with the former greater than the latter in each case. Please note that willful intent on the part of the evaluee is not implied. See sections of this report entitled, "Isometric Push/Pull" for additional specifics.

Dynamic Strength Testing

NIOSH Infrequent Lifting Protocol – The standard NIOSH Lifting Battery was administered and included the lifts in the table below. Heart rate was monitored (Polar Monitor) during the process with results recorded following each lift.

"RAW" (Relative Acceptable Weight) represents percentage of body weight lifted, while "RPE" (rating of perceived exertion) represents the worker's perceived exertion with the lift. The Borg RPE scale is as follows: 7 = Very, very light, 9 = Very Light, 11 = Fairly light, 13 = Somewhat hard, 15 = Hard, 17 = Very hard, and 19 = Very, very hard.

Frequency	Range of Lift	Max Load	RAW	Heart Rate	RPE	PDC Level
Occasional	Floor to Knuckle	N/A	N/A	N/A	N/A	Declined
Occasional	Knuckle to Shoulder	30#	.154	108	13	Medium
Occasional	Shoulder to Reach	25	.128	99	13	Medium

Comments: Body mechanics instruction was necessary due to the worker's tendency to stand too far from the load during the lifting, transferring, and lowering process. He was instructed in correct technique in the interest of preventing an injury to his back. Mr. Nash articulated that moving his feet while handling the crate was stressful to his left hip.

Test #1: Floor to knuckle lifting was declined by the evaluee due to his inability to use proper mechanics. He is unable to squat and bending is contraindicated in the interest of safety to his lumbar spine in manual material handling activities.

Test #2: Knuckle to shoulder lifts were done with loads of 10, 15, 20, 25, and 30 pounds. Mr. Nash reported "balance issues" with loads of 25# and 30#. He also reported a slight increase in left hip pain with the 30# load. As a result, he chose to self-limit performance at this load.

Test #3: Shoulder to overhead lifts were done with loads of 10, 15, 20, and 25 pounds. Most of the worker's bodyweight was borne on his right LE. He self-limited this test after the 25# lift, citing "balance issues". Per his report, the 20# load was more comfortable in the range of motion.

Carrying – Bilateral carrying performance ratings per Snook and Cirello, (1991) for 1 carry every 30 minutes. Unilateral performance norms are not available.

TASK	DISTANCE	LOAD	PERCENTILE
Bilateral Carry	50 feet	Declined	N/A
Unilateral Carry (R)	25 feet	25 pounds	N/A
Unilateral Carry (L)	25 feet	Declined	N/A

Comments: Bilateral carrying (load at waist) was not performed as Mr. Nash reported inability to perform. See "Carrying" in the section of the report entitled, "Reported Functional Tolerances".

Unilateral carrying (suitcase fashion) was performed to the level above and was noteworthy for an antalgic gait during right handed carries of 10#, 15# and 20#. Balance reportedly became more difficult to maintain with each load. After the 20# load, the evaluee self-limited due to decreased balance and persisting pain in the left hip, rated at 5/10. Left unilateral carrying was declined to minimize left hip stress.

Projected Eight-Hour Work Capacity

Physical Work Capacity – Submaximal treadmill protocol (12 minutes total) per Thomas and Zehas, 1987. The "Functional MET" listed below (40% of MOU) offers a prediction of safe eight-hour work capacity. Aerobic Classification ratings are based upon age/gender based norms.

Functional Measure	Result
Maximum Oxygen Uptake (MOU)	Declined
Maximum MET Level (VO2/3.5)	Declined
Functional MET Level (Max Met*40%)	Declined
U.S. Dept. of Labor Rating (FMET)	Declined
Aerobic Classification Rating	Declined

Comments: Given this evaluee's level of reported pain (after lifting and carrying tasks), the treadmill test was declined to avoid increasing pain to a higher level.

Dr. Helgager, thank you for referring this worker to our facility. I hope that the findings are useful to you. Please refer to the "Functional Capacity Evaluation Report" for overall findings, interpretation, and recommendations.

If I may be of further assistance in interpreting or applying the results of this evaluation, please feel free to contact me at (714) 404-7794.

Respectfully submitted,

Richard S. Carlton, MOT, OTL, CVE
OT #30

Pacific Beach Physical Therapy, Inc.

Pacific Beach Physical Therapy, Inc.
Dave Manger, R.P.T.

03-30-06

RE: Todd Nash

OBJECTIVE:

ROM: HIP	LEFT	RIGHT
Flexion Bent Knee	40°	110°
Flexion SLR	35°	90°
Abduction	25°	50°
Adduction	15°	40°
Internal Rotation	20°	45°
External Rotation	15°	50°

MUSCLE STRENGTH:	LEFT	RIGHT
Hip Flexion	4-/5	5/5
Abduction	4-/5	5/5
Adduction	4-/5	4+/5
Internal Rotation	4-/5	5/5
External Rotation	4-/5	5/5
Knee Flexion	5/5	5/5
Knee Extension	5/5	5/5

Respectfully Submitted,

Dave Manger

David A. Manger, R.P.T. PT8911
Pacific Beach Physical Therapy

3737 Moraga Ave., Suite B-117, San Diego, CA 92117 • (858) 270-0981 • FAX (858) 270-2901

EXHIBIT
D

EXHIBIT D

EXHIBIT D

Analysis of Denial of Benefits Letter

On December 14, 2005, Mr. Stephen Eccles of CIGNA spoke to Mr. Nash to inform him that his long-term Disability benefits were being denied effective November 30, 2005. Subsequent to this call Mr. Eccles faxed Mr. Nash a copy of the denial letter. The denial letter states that "We" (presumably Mr. Eccles and other unnamed employees at CIGNA) reviewed the following information in conducting a review:

1. A Physical Ability Assessment form Dr. Tohidi completed October 19,2005
2. An Attending Physician statement completed by Dr. Tohidi March 31, 2005
3. Disability Questionnaire signed September 22, 2005
4. Tax returns for 2004
5. Surveillance conducted from October 25, 2005 through October 29, 2005

In this letter Mr. Eccles states, "you saw him every 3-6 months" referring to Mr. Nash's office visits with Dr. Tohidi. This is inaccurate. Mr. Nash had transitioned to seeing Dr. Tohidi only one time per year. Mr. Nash saw Dr. Tohidi on January 14, 2004 and not again until January 4, 2005. This was at the request of Dr. Tohidi and in accordance with his treatment plan of Mr. Nash.

In this letter, Mr. Eccles states that, "We attempted to get office notes from Dr. Tohidi and he has not responded to our request." Mr. Nash's conversations with Dr. Tohidi's office on December 15, 2005 uncovered that, Dr. Tohidi's office had faxed the Physical Abilities Assessment (PAA) form twice to Mr. Eccles. First, Dr. Tohidi's office faxed the PAA to Mr. Eccles on October 10, 2005 and then again on October 18, 2005. The claim file shows that at no time did Mr. Eccles attempt to clarify via phone call or detailed fax to Dr. Tohidi's office that he needed more information than the PAA Form.

Mr. Eccles referenced the surveillance conducted on Mr. Nash. The following quotes and comments represent elements of what Mr. Eccles wrote in the denial of benefits letter and what Mr. Nash actually did:

"Tuesday, 10.25.05"

Mr. Eccles wrote, "Carrying a 4' x 8' sheet of drywall in the store."

At no time did Mr. Nash carry a 4' x 8' sheet of drywall in the store. There is no statement to this fact in the surveillance report from Photofax nor is there any video tape evidence of this activity. It is not clear from where Mr. Eccles derived this information.

"loading it in your car and unloading it at home…"

At no time did Mr. Nash carry a 4' x 8' sheet of drywall. Mr. Nash is shown in the video moving a much smaller piece of drywall than a 4' x 8' sheet and doing so with great difficulty.

"Unloaded car, including scrap pieces of plywood"

Mr. Nash did not unload any pieces of plywood. Mr. Nash carried some small scraps of drywall weighting no more than a few pounds.

"Wednesday, 10.26.05"

"Climbing a ladder in your garage…"

Mr. Nash did not climb a ladder. Mr. Nash used a small step stool to retrieve an item for the construction crew working on his residence. Mr. Nash stepped up two steps of the stool with great difficulty. Due to the limited range of motion in his left hip, Mr. Nash used only his right leg to move himself up and down the steps.

"Thursday, 10.27.05"

"Traveling to Witch Creek Winery were you proceeded to work from approximately 10:30am until you left at approximately 2:30pm."

Mr. Nash arrived at Witch Creek Winery at approximately 10:00 am were he proceeded to relax and observe the operations of the winery. He left the winery at approximately 12:30pm to return home. During the time at the winery in the morning, Mr. Nash was active for approximately 35 minutes out of the two hours he was there. The majority of the time Mr. Nash simply relaxed, drank coffee, sampled wine, and observed the operations of others.

After resting at his residence for lunch, Mr. Nash returned to the winery at approximately 1:15pm and continued to observe the operations of the winery. Mr. Nash returned home from the winery at approximately 2:30pm. In the afternoon at the winery, Mr. Nash was active for approximately 20 minutes. The rest of the time Mr. Nash simply relaxed and observed the operations of the winery.

"Friday, 10.28.05"

"Loading a bucket with rock from the pile, putting it in the wheelbarrow and wheeling it up the driveway"

At no time did Mr. Nash fill a bucket up with rock. This is not shown in the surveillance video.

"Saturday, 10.28.05"

"Running up a fairly steep hill with the double stroller (no children were in it at this time)"

At no time did Mr. Nash run. This is not shown in the surveillance video.

In addition to the actual video recoding, the following exhibits provide an accurate description of the contents of the video surveillance recording:

Reference Exhibit 27, Analysis of Surveillance Video
Reference Exhibit 25, Analysis of Photofax Surveillance Report

Mr. Eccles states in his letter,

> "The person conducting the surveillance said you walked with a normal gait and exhibited no observable limitations in your motions while working, walking, bending and lifting. He obtained a total of 240 minutes of video recording of you performing the activities noted above."

No evidence has been found that Mr. Mike Brown, the Photofax employee who performed the surveillance, has any credentials or training in any area that enable him to accurately assess whether or not Mr. Nash walked with a modified gait.

The surveillance video clearly shows Mr. Nash walking with a limp and stumbling because he is in pain and is unable to move his left leg properly. Mr. Brown, the Photofax agent, states in his report that Mr. Nash,

> "…showed a slight limp as he walked back and forth" and "the claimant put weight on his right leg while bending."

However, Mr. Eccles failed to reference this in his denial of benefits letter or at any other place in the claim file.

In the claim file, members of the CIGNA claims team only reference the Photofax report. The CIGNA claims team has ignored the evidence clearly shown on the surveillance video. This video shows Mr. Nash consistently walking with a severely modified gait, moving his left leg behind him because it will not bend properly when he must perform an activity below his waist, and significantly modifying his activities due to his hip pain and limited range of motion.

Reference Exhibit 27, Analysis of Surveillance Video
Reference Exhibit 25, Analysis of Photofax Surveillance Report

Based on a review of Mr. Eccles' denial letter and the claim file there is no evidence that any member of the claims team personally reviewed the surveillance video. Based on a review of the claim file, it appears that the claims team relied solely on the written report of a non-CIGNA employee, Mr. Mike Brown. Mr. Brown does not have the experience, the capacity, or the credentials to assess the functional capabilities of a surveillance subject. Mr. Brown is unqualified to be used as a proxy for the qualified members of the CIGNA claim team.

Mr. Eccles states in the denial of benefits letter, "After review of the medical information in your claim file and the surveillance tapes, it appears you have the capabilities working in your normal occupation, as defined in the national economy..."

There exists nothing in Mr. Nash's claim file, nor in his medical files that provides evidence that Mr. Nash can sit upright or otherwise sit for an extended period as required by his Regular Occupation or any occupation for which Mr. Nash is, or may reasonably become, qualified based on education, training, or experience.

Mr. Eccles continues on with,
"...and in fact, may be working in another occupation at Witch Creek Winery."

Mr. Nash is not, nor has he ever been an employee of Witch Creek Winery.

Mr. Eccles assertion that Mr. Nash might be working in another occupation at Witch Creek Winery is without merit. Mr. Nash spent approximately three hours at the winery where he mostly lounged around and observed the activities of others. This single three-hour period was the only period over the five days of surveillance that Mr. Nash was shown to be involved with Witch Creek Winery. Mr. Eccles' files do not show any attempt to verify any employment of Mr. Nash with Witch Creek Winery, a task easily accomplished with a phone call to the winery.

"We have no medical evidence to show that you are disabled at this time from working in your Regular Occupation..."

Mr. Nash's claim-file contains enormous amounts of evidence showing that Mr. Nash is Disabled. The above statement by Mr. Eccles implies that the medical information in Mr. Nash's file was ignored in making the claim denial decision. In a letter and in phone calls with Mr. Nash, Mr. Eccles informed Mr. Nash that the existing medical evidence would be used in making the decision for benefits

Reference Exhibit 31, Claim File Entries of Mr. Stephen Eccles, Claim Manager
Reference Exhibit 32, Letter from Mr. Stephen Eccles to Mr. Todd Nash, dated November 28, 2005.

In the "Request for Reconsideration (Appeal)" portion of the denial letter from Mr. Eccles, he states, "In the absence of such reports we shall assume that these revealed normal findings and unimpaired function."

To make an assumption that the lack of a report implies that the report actually exists but does not support the claim is arbitrary and capricious. This is especially true when the expected reports are not identified and therefore left ambiguous, inferring that this could include any and all conceivable reports regardless of their relevance. The lack of a report is simply the lack of information and supports neither the claim nor the denial of the claim. In absence of a report, the expected fiduciary duty of the claims administrator is to analyze existing information in good faith to determine relevant applicability to the claims process.

Mr. Eccles's letter states, "This determination has been made in good faith and without prejudice under the terms and conditions of the contract, whether or not specifically mentioned herein.".

The reasons for denial as stated in Mr. Eccles' letter as detailed in this section above show multiple instances of CIGNA's lack of performance of fiduciary responsibility for the benefit of Mr. Nash. These deficits in performance show signs of less than good faith on the part of CIGNA.

As shown above in this section, the Denial of Benefits Letter from Mr. Eccles to Mr. Nash dated December 14, 2005, contains several instances of erroneous information, identifies multiple instances where CIGNA has fallen short of acting as a fiduciary to Mr. Nash, and asserts that arbitrary and capricious standards will be used in the evaluation of Mr. Nash's Appeal.